(18)

No. 98-1036-CSY Title: Illinois, Petitioner
v.
William aka Sam Wardlow

Docketed: December 29, 1998 Court: Supreme Court of Illinois

Entry	Date	Proceedings and Orders
	Dec 22 1998	Petition for writ of certiorari filed. (Response due April 9, 1999)
	Jan 11 1999	Waiver of right of respondent William aka Sam Wardlow to respond filed.
	Jan 13 1999	DISTRIBUTED. February 19, 1999
	Feb 3 1999	Response requested.
	Mar 18 1999	Order extending time to file response to petition until April 9, 1999.
	Mar 31 1999	Motion of respondent William aka Sam Wardlow for leave to proceed in forma pauperis filed.
	Mar 31 1999	Brief of respondent William aka Sam Wardlow in opposition filed.
	Apr 12 1999	Reply brief of petitioner Illinois filed.
	Apr 14 1999	REDISTRIBUTED. April 30, 1999
	May 3 1999	Motion of respondent William aka Sam Wardlow for leave to proceed in forma pauperis GRANTED.
	May 3 1999	Petition GRANTED. SET FOR ARGUMENT November 2, 1999. **********
	May 24 1999	Order extending time to file brief of petitioner on the merits until June 29, 1999.
	Jun 14 1999	Brief amici curiae of Americans for Effective Law Enforcement, et al. filed.
	Jun 17 1999	Joint appendix filed.
	Jun 28 1999	Brief amici curiae of National Association of Police Organizations, et al. filed.
	Jun 28 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jun 29 1999	Brief amicus curiae of United States filed.
	Jun 29 1999	Brief amicus curiae of Wayne County Prosecuting Attorney filed.
	Jun 29 1999	Brief amici curiae of Ohio, et al. filed.
	Jun 29 1999	Brief of petitioner Illinois filed.
	Jul 21 1999	Order extending time to file respondent's brief on the merits to and including August 9, 1999.
	Jul 27 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jul 30 1999	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Aug 6 1999	Brief of respondent William Wardlow filed.
	Aug 9 1999	Brief amicus curiae of NAACP Legal Defense & Educational Fund filed.
	Aug 9 1999	Brief amicus curiae of Rutherford Institute filed.
	Sep 3 1999	Record filed.
	Sep 7 1999	Record filed.

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No. 98-1036-CSY

Entry	Date	Proceedings and Orders
	Sep 8 1999	Reply brief of petitioner Illinois filed.
	Sep 10 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 1 1999	CIRCULATED.
	Nov 2 1999	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE STATE OF ILLINOIS,

Petitioner,

vs.

SAM WARDLOW,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a person's sudden and unprovoked flight from a clearly identifiable police officer, who is patrolling a high crime area, is sufficiently suspicious to justify a temporary investigatory stop pursuant to *Terry v. Ohio*.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Illinois, prays for a Writ of Certiorari to review the judgment and order of the Illinois Supreme Court which was entered on September 24, 1998.

OPINIONS BELOW

The opinion of the Illinois Supreme Court, which affirmed the Illinois Appellate Court's suppression of the evidence order and reversed respondent's conviction, was entered on September 24, 1998 and is reported at 183 Ill.2d 306, 701 N.E.2d 484 and reproduced in Appendix A of this Petition.

The opinion of the Illinois Appellate Court, First District, which suppressed the evidence and reversed respondent's conviction, was entered on March 18, 1997 and is reported at 287 Ill.App.3d 367, 678 N.E.2d 65 and reproduced in Appendix B of this Petition.

The order of the circuit court denying respondent's motion to suppress is unreported.

STATEMENT OF JURISDICTION

The order and judgment of the Illinois Supreme Court was entered on September 24, 1998. No Petition for Rehearing was filed. This Petition for a Writ of Certiorari is filed within 90 days of that order as required by Rule 13(1) of the rules of the Supreme Court. The decision of the Illinois Supreme Court was explicitly based on federal Constitutional law, in particular on the Fourth Amendment. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Respondent, Sam Wardlow, was charged with two counts of Unlawful Use of Weapon by a Felon and two counts of Unlawful Use of Weapon under Indictment Number 95-CR-26952. (CL. 9-14) Respondent filed a pretrial Motion to Suppress Physical Evidence and a hearing was held on this motion on October 25, 1995. (R. A1, CL. 22)

The only witness called upon to testify at the hearing was a nine year veteran Chicago police officer, Timothy Nolan. (R. A4, A11) Officer Nolan testified that on September 9, 1995 he was assigned to the Special Operations Section of the Chicago Police Department's Eleventh District. (R. A4) On that day Officer Nolan was adorned in his full police uniform which included his badge, name tag and a Chicago Police Department patch on his arm. (R. A11) Officer Nolan stated that one of the locations in the 11th District that has "high narcotics traffic" is in the area of 4035 West Van Buren. (R. A8, A9)

Officer Nolan stated that his assignment on September 9, 1995 was to investigate narcotics sales in this area of the 11th District. (R. A9) As such, Officer Nolan and seven other officers converged on this area in four separate cars. (R. A9) As these four police cars were driving east on Van Buren Street, Officer Nolan and his partner, Officer Harvey, were in the last car. (R. A4, A9, A10) He could not recall if their police car was marked or unmarked. (R. A4-A5) Officer Nolan explained that the purpose for having four cars converge on the same location at the same time is because normally there is an enormous amount of people in such areas, some of whom are there as customers while others served as lookouts. (R. A9)

As the officers were cruising down Van Buren Street, Officer Nolan saw the respondent standing near the front of 4035 West Van Buren Street. (R. A8-A9) Respondent then looked at the officers and took off running. (R. A6, A10) Officer Nolan could see that the respondent was carrying a white opaque bag under his arm while he was running. (R. A7, A8, A10)

Officer Nolan then turned his police car southbound and saw the respondent running down a gangway. (R. A6, A10) As he kept driving, he then saw the respondent running southbound through an alley. (R. A6) Officer Nolan and his partner were eventually able to catch up to and corner the respondent in the vicinity of 4036 West Congress Street. (R. A6, A10)

Still dressed in uniform, with his badge, patch and name tag visible, Officer Nolan exited his vehicle and stopped the respondent for the purpose of conducting a field interview. (R. A7, A11) Officer Nolan stated that it

was common to find weapons in the vicinity where narcotics are sold. (R. A13) Without announcing his office or asking the respondent any questions, Officer Nolan conducted a "protective pat-down" search "for [his] own safety." (R. A7) He did this by squeezing the outside of the white opaque plastic bag that respondent was holding under his arm. (R. A7, A11) The object that Officer Nolan felt inside the bag was hard, heavy and similar in shape to a revolver. (R. A11) Officer Nolan then looked inside the bag and found a Colt .38 caliber handgun loaded with five live bullets. (R. A12) It was at that time that the officer placed the respondent under arrest. (R. A8)[1]

The parties presented their arguments to the trial judge on October 25th and December 6th of 1995. (R. A14-A18, B5-B12) After hearing the respective arguments, the trial court judge denied respondent's suppression motion. (R. B13) In denying respondent's motion, the trial judge observed that it is common knowledge that police officers know of the areas in which drugs are being sold, and do have knowledge of the general areas where contraband, including weapons, are being carried. (R. B12) The judge noted that police officers have a right to drive up to these areas. The judge also observed that anybody can identify a police car, be it marked or unmarked. (R. B13) Under all of the attendant circumstances, including respondent's awareness of the circumstances that brought about the

[1] The transcript of the Report of Proceedings does not indicate the precise time of defendant's arrest. However, Officer Nolan's Arrest Report indicates that defendant was arrested at 12:15 p.m. (CL. C4)

officers' presence in that area and his flight upon looking in their direction, the trial judge concluded that the officers had a right to stop and question respondent, and in doing so, they had a right to protect themselves by conducting a pat-down search. (R. B13) Finally, the judge noted that once a person flees, after having looked in the direction of a police officer, "there's reasons to think there's a problem [; the officers] have a right to make inquiry." (R. B14)

Following a stipulated bench trial, the respondent was found guilty of Unlawful Use of a Weapon by a Felon and sentenced to two years imprisonment.

REASONS FOR GRANTING THE WRIT

I.

THE PRESENT ISSUE HAS BEEN LEFT OPEN BY THIS COURT IN TWO PRIOR CASES.

The present case squarely presents this Court with an issue that has twice eluded it. Specifically, the issue is whether police officers, who are patrolling a high crime area, are justified in temporarily stopping a person pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), when that person, suddenly and without provocation, breaks and runs away at the mere sight of the police.

First, in *Michigan v. Chesternut*, 486 U.S. 567 (1988), this Court granted a writ of certiorari to consider the following two questions:

> "whether the officers' pursuit of respondent constituted a seizure implicating Fourth Amendment protections, and, if so, *whether the act of fleeing, by itself, was sufficient to constitute reasonable suspicion justifying that seizure*." (emphasis added) 486 U.S. at 572.

This Court answered the first question by holding that Respondent Chesternut had not been seized by the police during the pursuit. Accordingly, this Court noted that,

> "[b]ecause we conclude that the officers' conduct did not constitute a seizure, we need not reach the second question." 486 U.S. at 572.

Second, in *California v. Hodari D.*, 499 U.S. 621 (1991), the two potential issues for resolution were whether Respondent Hodari had been seized at the time he dropped the drugs and, if he had, whether Hodari's flight gave the officer sufficient reasonable suspicion to justify the seizure. 499 U.S. at 623. This Court stated that, "[a]s this case comes to us, the only issue presented is whether, at the time he dropped the drugs, Hodari had been 'seized' within the meaning of the Fourth Amendment". 499 U.S. at 623. This was so because the State of California had conceded "that Officer Petoso did not have the 'reasonable suspicion' required to justify stopping Hodari [under *Terry v. Ohio*]". 499 U.S. at 623 n1. Although Justice Scalia, writing for the majority, opined "[t]hat it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial commonsense. See Proverbs 28:1 ('The wicked flee when no man pursueth')", he noted that "[w]e do not decide that point here but rely entirely upon the State's concession." 499 U.S. at 623 n1. Consequently, it is apparent that, on two occasions and for two different reasons, the present issue has escaped this Court's scrutiny. In the instant case, however, the question surrounding respondent's sudden flight from the police in a high crime area is the only issue to be resolved. Further, the petitioner, unlike the State of California, is by no means conceding that reasonable suspicion was lacking for a temporary investigative stop. Thus, the present case will enable this Court to finally address this important issue.

II.

THE FEDERAL AND STATE COURTS THAT HAVE CONSIDERED THE PRESENT ISSUE ARE IN CONFLICT.

Two members of this Court have suggested that flight from a clearly identified police officer in a high crime area can, in and of itself, furnish sufficient ground for a limited investigatory stop. *Michigan v. Chesternut*, 486 U.S. at 576 (Justice Kennedy, concurring, joined by Justice Scalia) ("It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for respondent's unprovoked flight gave the police ample cause to stop him.") *See also California v. Hodari D.*, 499 U.S. at 623 n1. However, as noted *supra*, this Court has yet to address this specific issue. *See Tom v. Voida*, 963 F.2d 952, 985 (7th Cir. 1992) (Federal Court of Appeals acknowledges that Supreme Court "has not decided whether flight alone may support a finding of reasonable suspicion.") In this Court's absence, the decisions of the several state and federal courts that have ruled on this issue have produced mixed results.

On the one hand are state court opinions which hold that flight from a police officer in a high crime area can be sufficient for an investigatory stop. Typical of these is *State v. Anderson*, 155 Wisc. 2d 77, 454 N.W.2d 763 (1990) where the Supreme Court of Wisconsin stated that:

Flight at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, "[i]t would be poor police work indeed for an officer . . . to have failed to investigate further." (citing *Terry*, 392 U.S. at 23)

* * * *

Accordingly, we hold that behavior which evinces in the mind of a reasonable police officer an intent to flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police. Such flight, although not illegal, gives rise to a reasonable suspicion that some sort of wrongful activity is afoot. *Anderson*, 454 N.W.2d at 766, 768.

State cases that have ruled similarly include *Platt v. State*, 589 N.E.2d 222 (Ind. 1992); *State v. Little*, 806 P.2d 749 (Wash. 1991); *State v. Andrews*, 565 N.E.2d 1271 (Ohio 1991); *State v. Stinnett*, 104 Nev. 398, 760 P.2d 124 (1988); *State v. Williamson*, 524 A.2d 655 (Conn. App. 1987); *State v. Johnson*, 444 N.W.2d 824 (Minn. 1989); *Harris v. State*, 205 Ga. App. 813, 423 S.E.2d 723 (1992); *State v. White*, 660 So. 2d 515 (La. Ct. App. 1995); *People v. Souza*, 9 Cal. 4th 224, 885 P.2d 982 (1994); *State v. Jackson*, 147 Wis.2d 824, 434 N.W.2d 386 (1989); *State v. Butler*, 415 S.E.2d 719 (N.C. 1992).

On the other hand are state court opinions which hold that flight from the police in a high crime area is insufficient for an investigatory stop. Typical of these is the instant case where the Illinois Supreme Court, in interpreting the Fourth Amendment, held that breaking and running away from a police officer, in a high crime area, can never be alone sufficient to conduct a temporary investigative stop. The Illinois Supreme Court reasoned that, while flight in a high crime area may produce an inference of guilt, the officer must be "able to point to specific facts corroborating the inference of guilt gleaned from defendant's flight" before he can make a lawful investigatory stop. (App. 12) State cases that have similarly held include *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992); *State v. Tucker*, 136 N.J. 158, 642 A.2d 401 (1994); *People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985); *State v. Talbot*, 792 P.2d 489 (Utah App. 1990); *Britt v. State*, 673 So. 2d 934 (Fla. App. 1996); *Hopkins v. State*, 661 So.2d 774 (Ala. App. 1994); *Dimascio v. Municipality of Anchorage*, 813 P.2d 696 (Alaska App. 1991); *People v. Wilson*, 784 P.2d 325 (Colo. 1989); *People v. Holmes*, 81 N.Y.2d 1056, 619 N.E.2d 396 (1993); *Watkins v. State*, 420 A2d 270 (Md. 1980).

The federal courts are also divided on this issue. Cases holding that flight can be sufficient for a temporary stop include *United States v. Cardona-Rivera*, 904 F.2d 1149 (7th Cir. 1990); *United States v. Lane*, 909 F.2d 895 (6th Cir. 1990); *United States v. Jackson*, 741 F.2d 223 (8th Cir. 1984); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. Vasquez*, 534 F.2d 1142 (5th Cir. 1976); *United States v. Haye*, 825 F.2d 32 (4th Cir. 1987) *United States v. Rundel*, 461

F.2d 860 (3rd Cir. 1972). Federal cases holding that flight is insufficient include *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981) and *United States v. Williams*, 314 F.2d 795 (6th Cir. 1963).

Additionally, Professor Wayne R. LaFave has reviewed and discussed several of these conflicting cases in his treatise on search and seizure. 4 Wayne R. LaFave, SEARCH AND SEIZURE, sec. 9.4(f) at 176-182 (3rd Ed. 1996). Finally, one legal commentator has discussed the instant issue and the conflicting cases and has made various proposals to resolve this problem. *See* Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 671-675, 681 (1994).

In short, state and federal courts are in irreconcilable conflict over the instant issue. As such, given the importance and frequency of occurrence of this issue, the existing conflict warrants this Court's resolution.

III.

THE ILLINOIS SUPREME COURT'S OPINION CONCERNS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED BY THIS COURT TO GIVE NEEDED GUIDANCE TO LOWER COURTS AND LAW ENFORCEMENT OFFICIALS THROUGHOUT OUR NATION.

Every single day law enforcement officers at all levels throughout our country are confronted with the issue presented in the instant case: whether to chase and temporarily stop a person in a high crime area who runs away at the mere sight of the police. The present case presents this Court with the perfect vehicle to visit and resolve this important and constantly reoccurring question.

First, it is beyond question that the Illinois Supreme Court decided the present case under federal Constitutional law. (App. 3-4, 12) *See Michigan v. Chesternut*, 486 U.S. at 571 n3. Second, the factual matrix of the present case is virtually identical to that of *Michigan v. Chesternut*, *supra*, and *California v. Hodari D.*, *supra*. The only noteworthy difference is that, while Respondents Chesternut and Hodari dropped the contraband drugs while they were being pursued, Respondent Wardlow kept the contraband gun in his possession until he was stopped and patted down. (App. 1, 2, 14) Third, the type of flight from police in issue here is of the most extreme kind: running at full speed. The present case does not involve a lesser means of movement such as walking away, whether slowly or swiftly, from a police officer. Fourth, a further delay in considering this issue will only increase and polarize the present conflict among the lower courts, while adding nothing to the debate. Said otherwise, this issue is ripe for this Court's review. Fifth, lower courts are relying on the suggestion of two members of this Court, noted *supra* at 7, that flight in a high crime area is sufficient for a temporary investigative stop. *See Platt v. State*, 589 N.E.2d at 226, *State v. Anderson*, 454 N.W.2d at 767. Petitioner submits that it would be prudent for this Court to grant the present petition and determine whether or not this is also the view of the majority of this Court.

Finally, the present Illinois Supreme Court opinion essentially gives citizens the license, when they see a peace officer in a high crime area, to just break and run away. This puts the officers in the unenviable position of having to shrug their shoulders and helplessly stand watching while such persons escape. The Petitioner re-

spectfully submits that the present case presents this Court with the ideal means to address and rectify this untenable state of affairs.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant petition for Writ of Certiorari to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of The Illinois Supreme Court
Docket No. 83061, Filed September 24, 1998
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. SAM WARDLOW, Appellee.

JUSTICE HARRISON delivered the opinion of the court:

Defendant, Sam Wardlow, was convicted of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 1994)) following a stipulated bench trial in Cook County and was sentenced to a term of two years' imprisonment. On appeal, the appellate court reversed defendant's conviction, finding that defendant's motion to suppress evidence should have been granted because the revolver seized from him was discovered as a result of an improper investigatory stop. 287 Ill. App. 3d 367. We allowed the State's petition for leave to appeal. 166 Ill. 2d R. 315(a); 145 Ill. 2d R. 604(a)(2).

At the hearing on defendant's motion to suppress, Officer Timothy Nolan testified that on September 9, 1995, he and his partner, Officer Harvey, were assigned to the special operations section of the Chicago police department. On that date, Nolan and Harvey were among eight officers in four cars travelling eastbound on West Van Buren Street with the purpose of investigating narcotics sales in that area. Nolan stated that he was working in uniform, but did not recall whether the police car he drove, the last in the "caravan," was marked or unmarked.

Nolan testified that as he was driving, he observed defendant standing in front of 4035 West Van Buren.

Defendant, who did not appear to be violating any laws, looked in the officers' direction and then fled. Nolan turned his vehicle southbound toward Congress Avenue, continuing to observe defendant, who ran southbound through a gangway and then through an alley. Nolan stated that defendant, who was carrying a white opaque bag under his arm, was cornered in the vicinity of 4036 West Congress when he "ran right towards us."

Nolan exited his car and stopped defendant. Without announcing his office or asking any questions, he conducted a protective pat-down search of defendant. Nolan testified that he could not see inside the bag defendant was carrying so he "squeezed" the bag and felt a very heavy, hard object 'that had a similar shape to a revolver or a gun." Believing the object to be a weapon, Nolan opened the bag and found a .38-caliber handgun containing five live rounds of ammunition. Nolan then placed defendant under arrest.[1]

Responding to the State's question as to why he "went to that location on that date and time," Nolan answered that it was "one of the areas in the 11th District that's high narcotics traffic." Nolan further testified that, based upon his experience in investigating areas in which narcotics were sold, it was common for there to be weapons "in the near vicinity" and he considered that fact as he approached "that specific scene." After hearing arguments by the parties, the trial court denied defendant's motion to suppress.

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[1] While no testimony was presented as to the precise time of defendant's arrest, the record contains Nolan's arrest report, which indicates a time of 12:15 p.m.

Generally, a trial court's ruling on a motion to suppress evidence is subject to reversal only if manifestly erroneous. *People v. Dilworth*, 169 Ill. 2d 195, 201 (1996). This clearly erroneous or manifestly erroneous test is based on the understanding that suppression motions usually raise mixed questions of law and fact. See *People v. Frazier*, 248 Ill. App. 3d 6, 12 (1993). However, where, as here, neither the facts nor the credibility of the witnesses is contested, the determination of whether there is reasonable suspicion warranting an investigatory stop is a legal question which a reviewing court may consider *de novo*. See *In re D.G.*, 144 Ill. 2d 404, 408-09 (1991); *People v. Foskey*, 136 Ill. 2d 66, 76 (1990); see also *People v. Besser*, 273 Ill. App. 3d 164, 167 (1995).

The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. This provision applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 614, 95 S. Ct. 2574, 2578 (1975); *People v. Smithers*, 83 Ill. 2d 430, 433-34 (1980). In *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), the United States Supreme Court held that the public's interest in effective law enforcement makes it reasonable to detain and question individuals under certain circumstances in which probable cause to arrest is lacking. However, in order to protect "the individual's right to personal security free from arbitrary interference by law officers" (*Brignoni-Ponce*, 422 U.S. at 878, 45 L. Ed. 2d at 615,

95 S. Ct at 2579), the *Terry* Court held that such limited investigatory stops are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person has committed, or is about to commit, a crime. *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880; *Smithers*, 83 Ill. 2d at 434.

This *Terry* standard has been codified in our Code of Criminal Procedure of 1963. *People v. Flowers*, 179 Ill. 2d 257, 262 (1997); *People v. Long*, 99 Ill. 2d 219, 228 (1983). Section 107-14 of the Code provides, in pertinent part: "A peace officer *** may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense ***." 725 ILCS 5/107-14 (West 1994). The same standard is applied in determining the propriety of an investigatory stop under article I, section 6, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §6). See *People v. Tisler*, 103 Ill. 2d 226, 242-43 (1984) (the protection against unreasonable searches and seizures under the Illinois Constitution is measured by the same standards as are used in defining the protections contained in the fourth amendment to the United States Constitution).

Turning to the case before us, defendant contended on direct appeal that the trial court erred in denying his motion to suppress because his presence in a high-crime area and flight from police were insufficient to justify his investigatory stop. The appellate court agreed, but found the record "simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking" and limited its holding accordingly. 287 Ill. App. 3d at 370-71. However, we believe Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area. See *Ornelas v. United States*, 517 U.S. 690, 699, 134 L. Ed. 2d 911, 920, 116 S. Ct. 1657, 1663 (1996) (as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal, but reviewing court should take care both to review findings of fact only for clear error and to give due weight to inferences drawn from those facts by judges and local law enforcement officers). Thus, the issue presented by this appeal is whether an individual's flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop of the person. Defendant contends that such flight alone is insufficient to create a reasonable suspicion of involvement in criminal conduct. We agree.

A majority of jurisdictions addressing this issue have held that flight alone is insufficient to justify a *Terry* stop. See, *e.g.*, *State v. Tucker*, 136 N.J. 158, 642 A.2d 401 (1994); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992); *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Aldridge*, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983); *Watkins v. State*, 288 Md. 597, 420 A.2d 270 (1980). "Instead, courts require proof of some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight at the sight of the police. [Citations.]" *Hicks*, 241 Neb. at 362-63, 488 N.W.2d at 363; see also *Tucker*, 136 N.J. at 169, 642 A.2d at 407 (for departure to take on the legal significance of flight, there must be some

circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt).

In *Hicks*, the Nebraska Supreme Court examined a number of these "location plus evasion" cases and, in a well-reasoned opinion, concluded:

> "[A]llowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while a police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer some questions, neither is the person under any obligation to answer. *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The person may decline to listen to the questions at all and simply go on his or her way. *Id.* If the option to 'move on' is chosen, the person 'may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.' 460 U.S. at 498.
>
> *** Flight upon approach of a police officer may simply reflect the exercise—'at top speed'—of the person's constitutional right to '"move on."' *Shabaz*, 424 Mich. at 63, 378 N.W.2d at 460. *Terry* and *Royer* stand for the proposition that exercise of this constitutional right may not

> itself provide the basis for more intrusive police activity.
>
> ***
>
> A prime concern underlying the *Terry* decision is protecting the right of law-abiding citizens to eschew interactions with the police. Authorizing the police to chase down and question all those who take flight upon their approach would undercut this important right and upset the balance struck in *Terry* between the individual's right to personal security and the public's interest in prevention of crime. We therefore join those jurisdictions holding that flight from a police officer is sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct. [Citations.]" *Hicks*, 241 Neb. at 363-64, 488 N.W.2d at 363-64.

Although no Illinois court has specifically considered whether sudden flight from police in a high-crime area justifies a stop, we agree with the appellate court that "[i]n Illinois, neither a person's mere presence in an area where drugs are sold (*People v. Harper*, 237 Ill. App. 3d 202, 205, 603 N.E.2d 115 (1992)) nor sudden flight (*People v. Rivera*, 233 Ill. App. 3d 69, 77, 598 N.E.2d 423 (1992)) alone will justify a *Terry* stop." 287 Ill. App. 3d at 370; see also *People v. Fox*, 97 Ill. App. 3d 58 (1981) (driving away at approach of marked police vehicle not a justification for stop). Moreover, this court has recently emphasized the importance of protecting the freedom to engage in such harmless activities as "loafing, loitering, and nightwalking" and other personal liberties of citizens, including the right to travel, to locomotion, to freedom of movement, and to

associate with others. *City of Chicago v. Morales*, 177 Ill. 2d 440, 459-60 (1997), cert. granted, ___ U.S. ___, 140 L. Ed. 2d 664, 118 S. Ct. 15.

In *Morales*, we found that a City of Chicago ordinance which prohibited certain individuals from loitering in public places violated substantive due process because it unreasonably infringed on "the personal liberty of being able to freely walk the streets and associate with friends." *Morales*, 177 Ill. 2d at 460-61. We find similarly unreasonable the State's proposal, in the instant case, that every person observed in "sudden and unprovoked flight" from an officer may be stopped regardless of whether the surrounding circumstances indicate the person is involved in criminal activity. *Cf. People v. Holdman*, 73 Ill. 2d 213 (1978) (defendants' flight following officers' shining bright light into vehicle they reasonably believed to be associated with fugitive for whom they had warrant was indication of criminal activity requiring police pursuit). As defendant suggests, "[i]f the police cannot constitutionally force otherwise law-abiding citizens to move, the police cannot force those same citizens to stand still at the appearance of an officer." Therefore, because we agree with the majority of courts that view the unequivocal flight of a suspect upon seeing police as not alone indicative of criminal activity, we now examine the record herein to determine if there are corroborating circumstances sufficient to create the reasonable suspicion necessary for the stop of defendant.

The case before us is factually similar to *People v. Mamon*, 173 Mich. App. 429, 435 N.W.2d 12 (1988), *rev'd on other grounds*, 435 Mich. 1, 457 N.W.2d 623

(1990). There, two police officers were driving on routine patrol in a marked squad car through an area known for narcotics activity. As the officers approached the defendant, Mamon, standing on corner near a public phone, he took off running. The officers pursued the defendant on foot, noticing that he removed a case from his pocket and dropped it during the chase. The officers ultimately caught the defendant and retrieved the case, which contained cocaine. The trial court quashed an information charging the defendant with possession of a controlled substance, and the State appealed.

The Michigan appeals court affirmed the trial court's decision, first addressing the circumstances existing before the defendant began to run. Though the incident occurred in a high-crime neighborhood, the court determined that a person's presence in such an area cannot, by itself, provide the basis for an investigatory stop. In so doing, the court noted that the officers were not responding to a particular complaint of wrongdoing in the area and that the defendant made no furtive gestures prior to seeing the officers. Concluding that the officers lacked an articulable basis for stopping the defendant as he stood on the corner, the court turned to the significance of his flight upon their approach. Noting the ambiguous nature of flight as an indicator of guilt, the court held that the act of running at the sight of police patrolling a high-crime area did not provide the particularized grounds necessary to support a reasonable suspicion that criminal activity was afoot. *Mamon*, 173 Mich. App. at 435-38, 435 N.W.2d at 14-16.

Here, similar to *Mamon*, Officers Nolan and Harvey were "caravaning" with several other police vehicles

when the incident occurred. They were not responding to any call or report of suspicious activity in the area. Though Officer Nolan testified that that area of the 11th District is known for "high narcotics traffic," we agree with our appellate court's opinion in *Harper*, 237 Ill. App. 3d at 205-06, and the numerous decisions from other jurisdictions, holding that a person's presence in such an area by itself does not warrant a suspicion that that person is involved in crime. See *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979); *Hicks*, 241 Neb. at 366, 488 N.W.2d at 365; *Shabaz*, 424 Mich. at 60, 378 N.W.2d at 459; see also *In re D.J.*, 532 A.2d 138, 143 (D.C. App. 1987) (innocent activities do not become sinister by the mere fact that they take place in a high-crime area).

It is also clear that defendant herein gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan's vehicle. Defendant was simply standing in front of a building when the officers drove by. As in *Mamon*, the officers lacked an articulable basis for suspecting defendant of involvement in criminal activity prior to the point at which he turned and ran.

In *Fox*, the Illinois case which most closely approximates the issue presented herein, the appellate court foreshadowed our concerns, stating:

> "At the time of the stop, the investigating officers were aware that 'partying and littering' had recently occurred in the *** area and also that the vehicle in which the defendant was riding as a passenger exited the area at a speed which one officer believed to be unreasonable upon the approach of a squad car. But, the officers testifying on behalf of the State did not relate that *any additional suspicious or unusual activities* that would have alerted the police to the possibility of criminality were carried on by the occupants of the automobile. ***
>
> ***
>
> In short, the evidence adduced in this case does not support the State's contention that the police were aware of specific and articulable facts to justify the stop here. Rather, the evidence suggests that the police officers were operating under a suspicion or hunch that the vehicle contained someone who had committed or was about to commit a crime." (Emphasis added.) *Fox*, 97 Ill. App. 3d at 63-64.

Here, as in *Fox*, in the absence of circumstances corroborating the conclusion that defendant was involved in criminal activity, Officer Nolan's testimony reveals nothing more than a hunch.

As our brethren on the Supreme Court of Colorado have so aptly stated:

> "We are aware that the weighty social objective of crime prevention might well be served by permitting stops and detentions without any requirement of a reasonable suspicion that criminal activity has occurred or is about to take place. In the absence of specific and articulable facts supporting the reasonable suspicion, however, 'the balance between the public interest and [defendant's] right to personal security and privacy tilts in favor of freedom from police interference.' *Brown v. Texas*, [443 U.S.] at 52, 99 S. Ct. at 2641, 61 L. Ed. 2d at 363." *Thomas*, 660 P.2d at 1277.

Where, as here, the police stop is not based upon objective criteria pointing to a reasonable suspicion of criminal activity, "the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. at 52, 61 L. Ed. 2d at 363, 99 S. Ct. at 2641.

Therefore, because Officer Nolan was not able to point to specific facts corroborating the inference of guilt gleaned from defendant's flight, his stop and subsequent arrest of defendant were constitutionally infirm. U.S. Const., amend. IV; Ill. Const 1970, art. I, §6. The appellate court, therefore, properly reversed the trial court's denial of defendant's motion to suppress evidence. The weapon that was the basis for defendant's conviction should have been suppressed as the product of the unconstitutional seizure of his person. *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L.Ed. 2d 441, 455, 83 S.Ct. 407, 417 (1963).

For the foregoing reasons, the judgment of the appellate court, reversing the judgment of the circuit court, is affirmed.

Appellate court judgment affirmed.

APPENDIX B

Opinion of The Appellate Court of Illinois
First District, Second Division
No. 1-96-0094, Filed March 18, 1997

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	No. 95 CR 26952
v.	)	The Honorable Fred Suria, Judge Presiding.
SAM WARDLOW,	)	
Defendant-Appellant.	)	

JUSTICE DiVITO delivered the opinion of the court:

Following a bench trial, defendant Sam Wardlow was found guilty of unlawful use of a weapon by a felon and was sentenced to two years' imprisonment. The sole issue in this appeal is whether the circuit court erred in denying defendant's motion to suppress the gun that was seized from him during an investigatory stop. For the reasons that follow, we conclude that defendant's motion to suppress should have been granted and we reverse his conviction.

At the hearing on defendant's motion to suppress, Officer Timothy Nolan testified that on September 9, 1995, he and his partner, Officer Harvey, were assigned to the special operations section of the Chicago police department. They were among eight officers in four cars who were driving eastbound on West Van Buren. Officer Nolan's car was last in the line of vehicles driving in the area. Although Officer Nolan could not

recall whether his car was marked, he and his partner were in uniform. There was no evidence concerning whether any of the other cars were marked or concerning the clothing of the other officers.

The cars were "caravaning" eastbound down Van Buren, when Officer Nolan observed defendant, who was not violating any laws, standing near the front of 4035 West Van Buren Street. Defendant looked in the officers' direction, then fled. Holding a white bag under his arm, he ran through a gangway and then through an alley. Officer Nolan drove south, observing defendant as he ran. Near 4036 West Congress, defendant ran towards him.

Officer Nolan exited his car and stopped defendant. Without announcing his office or asking any questions, he conducted a protective pat-down search of defendant. He could not see inside the plastic bag that defendant was carrying. He patted the outside of the bag and "felt a hard object that had a similar shape to a revolver or a gun." Officer Nolan believed the object, which was very heavy, to be a weapon. He looked inside the bag and found a .38-caliber handgun containing five live rounds of ammunition. He then placed defendant under arrest.

Officer Nolan testified that he and the other officers had gone to the area because it was "one of the areas in the 11th District that's high narcotics traffic." Based upon his experience with investigation of areas in which narcotics are sold, Officer Nolan knew that it was common to find weapons in the vicinity of such areas.

The police report indicated that defendant, who was 44 years old, was arrested at 12:15 p.m.

The circuit court denied the motion to suppress. A stipulated bench trial followed, and defendant was found guilty of unlawful use of a weapon by a felon and was sentenced to a two-year term of imprisonment.

In this appeal, defendant contends that the circuit court erred in denying his motion to suppress because his presence in a high crime area and flight from the police officers were insufficient to justify his investigatory stop. We note that although no Illinois court has considered whether sudden flight from police officers in a high crime area justifies a stop, other jurisdictions are divided on the question. Compare *Harris v. State*, 205 Ga. App. 813, 423 S.E.2d 723 (1992), and *State v. White*, 660 So. 2d 515 (La. Ct. App. 1995) (flight from police officers in high crime area justifies investigatory stop), with *People v. Holmes*, 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993), *affirmed*, 89 N.Y.2d 838 (1996), *Hopkins v. State*, 661 So. 2d 774 (Ala. Crim. App. 1994), *Britt v. State*, 673 So. 2d 934 (Fla. App. 1996), and *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992) (flight from police officers in high crime area does not justify stop).

Where, as here, there is no challenge to the facts or the credibility of the witnesses, we review a motion to suppress *de novo*. *People v. Foskey*, 136 Ill. 2d 66, 76, 554 N.E.2d 192 (1990); *Ornelas v. United States*, 517 U.S. ___, ___, 134 L. Ed. 2d 911, 920, 116 S. Ct. 1657, 1663 (1996).

Under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) (codified at 725 ILCS 5/107-14 (West

1994)), a police officer may stop and detain a person for temporary questioning if the officer reasonably infers from the situation that the person is committing, is about to commit, or has committed a crime. *Terry*, 392 U.S. at 22, 20 L. Ed. 2d at 906-07, 88 S. Ct. at 1880. To justify an investigatory stop, the police officer must be able to point to specific and articulable facts that reasonably warrant the intrusion. *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880. In determining whether a stop is reasonable, the court employs an objective standard: would an officer of reasonable caution, knowing the facts available at the time of the stop, believe the action was appropriate? *People v. Rivera*, 272 Ill. App. 3d 502, 504-05, 650 N.E.2d 1084 (1995), *appeal denied*, 164 Ill. 2d 577, 660 N.E.2d 1277 (1995).

In Illinois, neither a person's mere presence in an area where drugs are sold (*People v. Harper*, 237 Ill. App. 3d 202, 205, 603 N.E.2d 115 (1992)) nor sudden flight (*People v. Rivera*, 233 Ill. App. 3d 69, 77, 598 N.E.2d 423 (1992)) alone will justify a *Terry* stop. Past criminal activity in an area (*People v. Hunt*, 188 Ill. App. 3d 359, 362, 544 N.E.2d 118 (1989), *appeal denied*, 128 Ill. 2d 668, 548 N.E.2d 1074 (1989)) and flight (*Rivera*, 233 Ill. App. 3d at 77), however, are relevant factors to be considered in determining whether circumstances justify an investigatory stop.

For example, in *People v. Rivera*, 233 Ill. App. 3d 69, 76-77, 598 N.E.2d 423 (1992), police officers entered the defendant's bar, having received information that cocaine was stored in the basement and the defendant was involved in its sale and distribution. According to the testimony of the police officers, the defendant appeared frightened and fled when they entered the bar. *Rivera*, 233 Ill. App. 3d at 77. The court found that the flight of defendant, combined with the information known to the officers, provided the requisite reasonable suspicion. *Rivera*, 233 Ill. App. 3d at 77.

From the record before us, we cannot discern the precise location of the area known by the officers to have a high incidence of narcotics trafficking. After he testified that he noticed defendant at 4035 West Van Buren, Officer Nolan was asked why he went to that area. He responded that it was one of the areas in the 11th District that had "high narcotics traffic." His testimony indicates only that the officers were headed somewhere in the general area. There was no evidence that the officers were investigating the specific area where defendant had been standing or that any of the police cars had stopped at that location or that defendant had any basis for believing that police were interested in his activity.

Officer Nolan testified that he was "caravaning" down West Van Buren when he noticed defendant. He did not testify that the officers were targeting 4035 West Van Buren because it was known to be a location where drugs were sold. From the evidence elicited at the hearing on the motion to suppress, it appears that the officers were simply driving by, on their way to some unidentified location, when they noticed defendant standing at 4035 West Van Buren. The record here is simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking or, for that matter, that defendant's flight was related to his expectation of police focus on him.

Because we find no support in the record for the contention that defendant was in a high crime location, we are left only with the fact of his sudden flight from an area past which police officers were driving. That circumstance alone does not satisfy the requirements for a lawful investigatory stop. *Rivera*, 233 Ill. App. 3d at 77. Accordingly, the circuit court erred in denying defendant's motion to suppress.

We emphasize the limited nature of our holding. Because we recognize the importance of the police interest in investigating crime, we do not hold that the presence of a suspect in a high crime location, together with his subsequent flight from police, is never grounds for a *Terry* stop. Certainly, a "high crime area is a place in which the character of the area gives color to conduct which might not otherwise raise the suspicion of an officer." *White*, 660 So. 2d at 519. To pass constitutional muster, however, the high crime area should be a sufficiently localized and identifiable location. This limitation is necessary to "assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field," simply because he or she happens to live in a neighborhood where crime is prevalent. *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362, 99 S. Ct. 2637, 2640 (1979).

Accordingly, the weapon that was the basis for defendant's conviction should have been suppressed because it was discovered as a result of an unjustified investigative stop. *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455, 83 S. Ct. 407, 417 (1963). Rather than remanding, we reverse defendant's

conviction outright because the State will not be able to prevail without the recovered evidence. *People v. Evans*, 259 Ill. App. 3d 650, 659, 631 N.E.2d 872 (1994).

The judgment of the circuit court is reversed.

Reversed.

RAKOWSKI and McNULTY, JJ., concur.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
MAR 5: 1999
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

(2)

No. 98-1036

STATE OF ILLINOIS,

Petitioner,

v.

WILLIAM a.k.a. SAM WARDLOW,

Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of Illinois

MOTION TO PROCEED IN FORMA PAUPERIS

The Respondent, William a.k.a. Sam Wardlow, asks leave to file the attached Response to Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed at trial before the Circuit Court of Cook County, Illinois and on appeal to the Illinois Appellate Court and Illinois Supreme

23 pp

Courts. Counsel for Respondent has attached an affidavit in support of this motion hereto.

Eileen T. Pahl
Assistant Public Defender

RITA A. FRY
COOK COUNTY PUBLIC DEFENDER
Eileen T. Pahl
Assistant Public Defender
69 West Washington Street
15th floor
Chicago, Illinois 60602
(312) 603-0600

AFFIDAVIT

I, Eileen T. Pahl, being first duly sworn according to law, depose and say that I am counsel for the respondent in the above-entitled case; that in support of his motion to proceed without being required to prepay fees, costs, or give security therefor, I state as follows:

1. The Office of the Cook County Public Defender was appointed by the Circuit Court of Cook County to represent the respondent in forma pauperis at trial and on direct appeal to the Illinois Appellate and Supreme Courts.

2. I have attached a copy of the order appointing the Office of the Cook County Public Defender for respondent on his direct appeal.

3. William a.k.a. Sam Wardlow is currently incarcerated in the Illinois Department of Corrections on an unrelated charge. His outdate is April 1, 1999. Mr. Wardlow will reside in a half-way house upon his release from incarceration.

4. William a.k.a. Sam Wardlow has executed the attached affidavit attesting that he has no job, no source of income, no bank accounts and owns no real estate.

5. Given his lack of income or assets and his current incarceration, it is unlikely that Wardlow would be able to afford the expenses involved in Supreme Court litigation.

FURTHERMORE AFFIANT SAYETH NOT

BY: Eileen T. Panl

SUBSCRIBED AND SWORN TO
Before me this 31st day
of March 1999.

Ann T. Rowston

OFFICIAL SEAL
ANN T ROWSTON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 04-19-00

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

E OF THE STATE OF ILLINOIS)
) No. 95-CR-26952
) Trial Judge: SURIA
-vs-) Attorney: CAVANAUGH
)
ARDLOW)

FILED
DEC 19 1995
AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

NOTICE OF APPEAL

eal is taken from the order of judgment described below:
ANT'S NAME: SAM WARDLOW
09793 D.O.B. 5/19/51
ANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS
ANT'S ATTORNEY: PUBLIC DEFENDER OF COOK COUNTY.
ANT'S ADDRESS: 200 WEST ADAMS, CHICAGO, IL 60606
SE: UNLAWFUL USE OF WEAPON/FELON
ENT: GUILTY AFTER BENCH TRIAL
12/6/95
NCE: 2 YEARS IDOC

Sam Wardlow #c
APPELLANT

VERIFIED PETITION FOR REPORT OF PROCEEDINGS
COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Supreme Court Rules 605-608, appellant asks the Court to order the
ial Court Reporter to transcribe an original and copy of the proceedings,
he original with the Clerk and deliver a copy to the appellant; order tho
to prepare the Record on Appeal and to Appoint Counsel on Appeal.
ant, being duly sworn, says that at the time of his conviction he was and
able to pay for the Record or an appeal lawyer.

Steve D. Carmond
APPELLANT'S ATTORNEY

IBED and SWORN TO this _____ day of _____, 1995

_____
NOTARY PUBLIC

O R D E R

ORDERED the ~~State Appellate Defender~~/Public Defender of Cook County be
ted as counsel on appeal and the Record and Report of Proceedings be
shed appellant without cost. Dates to be transcribed:

IAL MOTION DATE(S): 10/25/95 OTHER:
AIVER DATE:12/6/95
DATE(S): 12/6/95
NCING DATE(S): 12/6/95

12-19-95

ENTER: Joseph J. Kuzmich Jr

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, William a.k.a. Sam Wardlow, being first duly sworn deposes and says that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepare fees, costs or give security thereof, I state that because of my poverty I am unable to pay the costs of this case or to give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No___

   a. If the answer is yes, state the amount of your salary or wages per month and give the names and address of your employer.

   _____

   _____

   _____

   _____

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

   _____

   _____

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

   Yes___ No___

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   _____

   _____

   _____

   _____

3. Do you own any cash, checking or savings accounts?

Yes___ No___

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)?

Yes___ No___

a. If the answer is yes, describe the property and state its approximate value.

_____

_____

_____

_____

_____

5. List the persons who are dependent upon you to support and state your relationship to these persons.

_____

_____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

By: _____

WILLIAM A.K.A. SAM WARDLOW

SUBSCRIBED and SWORN TO
Before me this day
of , A.D., 999.

_____
Notary Public

"OFFICIAL SEAL"
Tangilla Tipton
Notary Public, State of Illinois
My Commission Expires 5/20/01

Supreme Court
FILED
MAR

No. 98-1036

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF ILLINOIS,

Petitioner,

v.

WILLIAM a.k.a. SAM WARDLOW,

Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of Illinois

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

RITA A. FRY
Cook County Public Defender

Eileen T. Pahl *
Assistant Public Defender

69 West Washington Street
15th Floor
Chicago, Illinois 60602
(312) 603-0600

Attorneys for Respondent

* Counsel of Record

QUESTION PRESENTED

As a matter of law, is it reasonable to stop for investigation a person who runs down a gangway after a stranger's car passes by on a busy urban street?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1036

STATE OF ILLINOIS,

Petitioner,

v.

WILLIAM a.k.a. SAM WARDLOW,

Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, William a.k.a. Sam Wardlow, respectfully requests that this Court deny the State of Illinois' Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois in this case.

STATEMENT OF THE CASE

Prior to trial, hearing was held on Wardlow's Motion To Suppress Evidence. (CLR. 22, R. A3).

At the hearing, Officer Timothy Nolan testified that on September 9, 1995, he and his partner were in uniform. (R. A4). He could not remember whether they drove a marked or unmarked police car. (R. A4-A5). Officer Nolan provided no description of the make, model or other distinguishing features of his car. He did not describe the unmarked cars used by the Chicago Police Department.

Officer Nolan and his partner went to the area near 4036 West Congress due to high narcotics traffic in that general area. (R. A9). Three other police cars also went to the location. (R. A9). Officer Nolan did not state whether those officers were in uniform or whether they drove marked cars. Officer Nolan's car was the last in a "caravan" heading eastbound down Van Buren Street. (R. A9-A10). A "large amount" of people was in the area. (R. A9).

Officer Nolan saw Sam Wardlow standing in front of 4035 West Van Buren. (R. A5, A8). Wardlow was not violating any laws. (R. A5-A6). Officer Nolan did not see anything in Wardlow's hands but saw a white bag under his arm. (R. A10). Wardlow looked towards Officer Nolan and began running through the gangway and southbound through the alley. (R. A6).

Officer Nolan drove southbound down the street towards Congress. (R. A6, A10). Wardlow ran right towards him. (R. A10-A11). When he caught up with Wardlow at 4036 South Congress, Officer Nolan did not announce his office or ask Wardlow any questions. (R. A7, A10). Instead, he performed a pat down search. (R. A7). Officer Nolan discovered a white opaque heavy plastic shopping bag under Wardlow's arm. (R. A7-A8, A12). He could not see inside of the bag. (R. A8). Officer Nolan squeezed the bag and felt a very heavy, hard object which had a similar shape to a revolver or gun and which he believed to be a weapon. (R. A8, A11-A12). He opened the bag and found a .38 caliber revolver with five live rounds. (R. A7, A12-A13). According to Officer Nolan, it is common for weapons to be in the vicinity of narcotics sales. (R. A13). Officer Nolan then placed Wardlow under arrest. (R. A8).

The trial court denied the motion to suppress. (R. B13). After a stipulated bench trial, the trial court found Wardlow guilty of unlawful use of a weapon by a felon. (R. CLR. 26, R. B19). The trial court then sentenced Wardlow to two years in the Illinois Department of Corrections. (R. B19-B20).

REASONS FOR DENYING THE PETITION

The State of Illinois has presented the following question in its petition:

> Whether a person's sudden and unprovoked flight from a clearly identifiable police officer, who is patrolling a high crime area, is sufficiently suspicious to justify a temporary investigatory stop pursuant to Terry v. Ohio.

Pet. at i.

This Court should not entertain the State of Illinois' Petition for a Writ of Certiorari. The facts presented in the case below do not correspond to the issue urged here by Illinois: the record contains no evidence that the address was a high crime location or that Wardlow fled from a clearly identifiable police officer. In any event, the Illinois Supreme Court correctly decided on the merits that a person's flight from the police in a high crime area did not justify a Terry stop in the absence of other suspicious circumstances. Finally, state and federal courts are not in "irreconciliable conflict" over this issue.

1. The facts before this Court do not "squarely" present the issue framed by the Petitioner. Pet. at 5. Respondent argued below that there was no evidence in the record to support the conclusion that the area around 4035 West Van Buren in Chicago was a high crime area or that a pedestrian would have known that a car driving by contained police officers. Officer Nolan testified that he could not recall whether his car was

marked. Respondent argued that the reviewing court should not pay deference to the trial court's finding that anyone could identify a police car, marked or unmarked.

The Illinois Appellate Court found that "(t)he record here is too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking or, for that matter, that defendant's flight was related to his expectation of police focus on him." Pet. App. at 17.

The Illinois Supreme Court disagreed with the Appellate Court on this point. "(W)e believe Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area." Pet. App. at 5, citing Ornelas v. United States, 517 U.S. 690, 699, 134 L.Ed.2d 911, 920, 116 S.Ct. 1657, 1663 (1996). The Illinois Supreme Court also found that Officer's Nolan's testimony that he could not recall whether he drove a marked or unmarked car was sufficient to establish that Wardlow fled "upon the approach of a police vehicle." Pet. App. at 5.

If the State of Illinois' petition for certiorari is granted, Wardlow contends that the Illinois Supreme Court misapplied the standard of review. The Illinois Supreme Court erroneously paid deference to the trial court's findings about a high crime area and the recognizability of police cars. The record was devoid of any facts to support those conclusions. Under proper application of de novo review, as done by the Illinois Appellate Court, the record here is too vague to

support the State's argument about a high crime area and about flight from the police.

Because the record does not support the State's assertions, this case is not "the perfect vehicle to visit and resolve" the question of whether a police officer may "chase and temporarily stop a person in a high crime area who runs away at the mere sight of the police." Pet. at 10.

2. With the exception of application of the standard of review discussed supra, the decision of the Illinois Supreme Court was correct on the merits. The Illinois Supreme Court properly applied the totality-of-the-circumstances test to conclude that both flight and presence in a high crime area are ambiguous acts which do not alone indicate criminal activity. Finally, the Illinois Supreme Court's analysis properly balances individual personal liberty rights against the legitimate needs of law enforcement.

"The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989), quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). "Reasonable suspicion" must be based on "the whole picture" and must be particularized to the specific individual. United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). Under these principles, the Illinois Supreme Court correctly rejected Illinois' proposed

blanket rule that any person who avoids the police in a high crime area may be stopped for investigation.

Flight is an ambiguous act which does not alone indicate criminal activity. See e.g. People v. Shabaz, 378 N.W.2d 451, 461 (Mich. 1985). Avoidance of strangers or the police may stem from motives other than consciousness of guilt. See e.g. In Re D.J., 532 A.2d 138, 142, n. 4 (D.C. App. 1987); State v. Lemmon, 568 N.E.2d 48, 56 (Md. 1990); Ringel, Searches & Seizures, Arrests and Confessions, 2d ed., vol 2. at pp. 13-36. Likewise, mere presence or even evasion in a high crime area does not warrant a suspicion that the person is involved in crime. See e.g. In Re D.J., 532 A.2d at 143; State v. Haviland, 532 N.W.2d 767 (Iowa 1995); People v. May, 609 N.E.2d 113 (N.Y. 1992); see also Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind.L.J. 659 (1994) (criticizing Terry stops based on "location plus evasion"). Because both flight and presence in a high crime area are consistent with innocent behavior, the Illinois Supreme Court properly found that additional suspicious circumstances were required to justify Officer Nolan's stop of Wardlow.

The Illinois Supreme Court's decision also correctly balanced the marginal utility of allowing officers to stop all persons suspicious or not who avoid the police against the severe impact of such stops on the personal liberty and other protected interests of innocent citizens. Terry v. Ohio, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). The rule proposed by Illinois would jeopardize the constitutional

right to move away from an encounter with a police officer. Florida v. Royer, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); State v. Hicks, 488 N.W.2d 359, 364 (Neb. 1992); Shabaz, supra, 378 N.W.2d at 460; May, supra, 609 N.E.2d at 115. In rejecting the proposed blanket rule, the Illinois Supreme Court also weighed the risk of arbitrary and abusive police practices against the objectives of law enforcement. Pet. App. at 11-12, citing Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357, 363 (1979).

Characterizing any decision to forego an encounter with the police as an "escape," Illinois protests that "the present Illinois Supreme Court opinion essentially gives citizens the license, when they see a peace officer in a high crime area, to just break and run away." Pet. at 11. This is not an "untenable-state of affairs," Pet. at 12, but an integral part of personal liberty. The Illinois Supreme Court specifically relied on its opinion in City of Chicago v. Morales, 177 Ill.2d 440, 687 N.E.2d 53 (1997), cert. granted 140 L.Ed.2d 664, 118 S.Ct. 1510 (1998), to conclude that "'(i)f the police cannot constitutionally force otherwise law-abiding citizens to move, the police cannot force those same citizens to stand still at the appearance of an officer.'" Pet. App. at 8.

Because the decision of the Illinois Supreme Court is well-reasoned and correct, this Court should not grant further review.

3. Illinois' petition exaggerates the split of authority on this issue. The majority of cases are in line with the decision of the Illinois Supreme Court. The minority cases are not in "irreconcilable" conflict but may be readily distinguished on their facts and on their analysis of the law.

Numerous commentators and courts have pointed out that the majority of jurisdictions have expressly rejected the argument that avoidance of the police alone justifies a Terry stop. See e.g. In Re D.J., supra, 532 A.2d at 142; Lemmon, supra, 568 A.2d at 54; Hicks, supra, 488 N.W.2d at 363; Ringel, Searches & Seizures, Arrests and Confessions, 2d ed., vol. 2 at pp. 13-36; LaFave, Search & Seizure, 3rd ed. (1996), vol. 4 at p. 176 (1996).

Upon closer reading, the cases cited in Illinois' petition relied on circumstances other than avoidance of the police in a high crime area to support a Terry stop. See e.g. Platt v. State, 589 N.E.2d 222, 226 (Ind. 1992) ("The whole picture shows that (the officer) pulled up behind a motorist by the side of a country road in the dead of night") (emphasis added); State v. Anderson, 454 N.W.2d 763 (Wis. 1990) (officers first encountered suspect in an alley at 2:00 a.m. after having received specific prior complaints about defendant's parking violations); State v. Little, 806 P.2d 749 (Wash. 1991) (officers who knew residents of fenced-in area had reason to believe that juveniles were trespassers); State v. Andrews, 565 N.E.2d 1271 (Ohio 1991) (officer alone on foot at night in dark area saw suspect throw object to ground); State v. Stinnett, 104 Nev. 398, 760 P.2d 124

(1988) (men near abandoned residence made movements consistent with narcotics sales); State v. Williamson, 524 A.2d 655 (Conn. App. 1987) (prior complaints of drug dealing at specific location and someone yelled out "police" when plain-clothes officers approached). Here, in contrast, the Illinois Supreme Court found that the record contained no additional suspicious circumstances to support the stop of Wardlow. Pet. App. at 10.

The cases cited in Illinois' Petition are further distinguishable because those cases fail to examine the impact on the personal liberty and other constitutional rights of law-abiding citizens or the risk of arbitrary and abusive police practices. See e.g. Platt, supra, 589 N.E.2d 222 (no discussion of freedom of movement or right to walk away from police); Anderson, supra, 454 N.W.2d 763 (same); State v. Johnson, 444 N.W.2d 824 (Minn. 1989) (dissent criticizes majority for failure to consider freedom of movement). The failure of litigants in a few minority jurisdictions to urge a full analysis of the issue does not warrant exercise of this Court's review.

In short, Illinois' Petition has advanced no grounds to warrant review. The facts in the record do not fit the question Illinois wishes this Court to reach. In any event, the decision of the Illinois Supreme Court was correct on the merits and in line with the decisions of other courts which have fully analyzed this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March ___, 1999

Supreme Court, U
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No. 98-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE STATE OF ILLINOIS,

Petitioner,

vs.

SAM WARDLOW, A.K.A. WILLIAM WARDLOW,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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ARGUMENT

In its petition, the State of Illinois presented this Court with a cornucopia of reasons why the instant petition should be granted. The respondent has not challenged the majority of those reasons. For example, the respondent does not argue with the fact that the present issue is important, that it is constantly reoccurring and that this Court specifically left it open in *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991), and in *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988). Nor does respondent quarrel with the fact that the Illinois Supreme Court decided the present case under the Fourth Amendment to the Federal Constitution. Nor does he dispute that the flight in question here is limited to running at full speed upon the mere sight of the police and that the present facts are practically identical to those in *California v. Hodari D.*, *supra*. Pet. at 11. Finally, respondent does not challenge the fact that lower courts have relied on the suggestion of two members of this Court (Pet. at 7) that flight upon the mere sight of the police can be sufficient reason for a temporary investigative stop and that, accordingly, it would be prudent for this Court to grant the instant petition and determine whether or not this is also the view of the majority of this Court. Rather, the respondent posits only three reasons why this Court should not grant the present petition. However, each of these reasons is meritless and should not deter this Court from directly addressing this important question.

1. The first argument that respondent presents against the granting of the instant petition is a factual one. Ironically, respondent's argument attacks the very opinion from the Illinois Supreme Court that he later

argues was correctly decided. Specifically, the respondent claims that the record is devoid of any facts to support the Illinois Supreme Court's opinion that the location where he was standing, 4035 West Van Buren Street, was a high crime area or that the respondent knew that the car in question contained police officers. Op. Cert. pp. 4-6. In making this assertion, however, the respondent closes his eyes to the record. During the prosecution's cross-examination of Officer Nolan, the following colloquy took place:

> [Prosecutor]: Officer, where was the defendant when you first observed him on that date?
>
> [Officer]: *He was standing approximately in the front of 4035 West Van Buren.*
>
> [Prosecutor]: And let me ask you, Officer, *why was it that you went to that location on that date and time?*
>
> [Officer]: *Its one of the areas in the 11th District that's high narcotics traffic* (sic).
>
> [Prosecutor]: How many partners or police officers went to that location along with you on that date and time?
>
> [Officer]: Including my partner and myself, there were eight of us altogether.
>
> [Prosecutor]: And eight police officers, how many different police cars.
>
> [Officer]: Four.
>
> * * *
>
> [Prosecutor]: What was the purpose for having four cars all converge on that same location on that date and time?
>
> [Officer]: Because of the large number of people. Normally in these different areas there's

> an enormous amount of people, sometimes lookouts, customers.
>
> [Prosecutor]: *And was it your assignment that day*, you and the other four police cars that converged on this area, *to try to investigate narcotics sales in that area.*
>
> [Officer]: *Yes, sir.*

(R. A8-A9) (Emphasis added)

Unquestionably, Officer Nolan's testimony establishes that he and his fellow officers were assigned to investigate narcotics sales in various areas of the 11th District by patrolling said areas. Officer Nolan's testimony also proves that 4035 Van Buren was one of those "areas" being patrolled by the officers because it was an area where there was a high incidence of narcotics sales. Thus, even a casual reading of the record shows that, contrary to respondent's claim, the record sufficiently identifies 4035 West Van Buren as an area where there was a high incidence of narcotics crime.

Additionally, the record establishes that Officer Nolan's car, which was passing in front of the respondent, was the last car in a four car "caravan" that contained a total of eight officers. (R. A9, A10) Further, Officer Nolan was dressed in his full police uniform which included his police badge, name tag and a Chicago Police Department patch on his arm. (R. A11) Finally, the record establishes that the respondent looked at Officer Nolan and his partner and then started to run. (R. A6, A10) Undeniably, and contrary to respondent's arguments, the record fully supports the Illinois Supreme Court's statement that respondent fled upon the approach of a police vehicle. Therefore, because the respondent's factual arguments amount to nothing more

than mere cavil, they present no reason why this Court should not grant the instant petition.

2. The second reason that respondent puts forth, so as to prevent further review by this Court, is that the Illinois Supreme Court's decision is correct. Op. Cert. pp. 6-8. The petitioner disagrees. Without going into an extensive discussion of the merits, the petitioner points out that even the Illinois Supreme Court acknowledged that sudden flight upon the mere sight of the police in a high crime area produces an "inference of guilt". App. 12. But then, the Illinois Supreme Court curiously turned around and held that an "inference of guilt" does not constitute sufficient reasonable suspicion for a temporary investigatory stop. The petitioner submits that this holding is erroneous, untenable and should be reviewed by this Court.

3. The respondent's third and final attempt to preclude review by this Court is his assertion that there is no irreconcilable conflict among the lower courts over the present issue. Op. Cert. pp. 9-10. The petitioner is at a loss to understand how the respondent can seriously dispute that there is an irreconcilable conflict here. All this Court has to do is read the avalanche of cases, both state and federal, in Illinois' petition to see that a conflict does in fact exist and that it is substantial and irreconcilable.

In closing, the petitioner reiterates that the instant petition provides this Court with the truly perfect vehicle to visit and resolve this most important question. The present factual scenario, pursuit of a person in a high crime area who takes sudden flight upon the mere sight of the police, is one that is played out countless times

throughout our nation. These pursuits frequently result in law enforcement officials and/or citizens being injured or killed. The State of Illinois respectfully submits that police officers are entitled to know from the highest Court of the land, before they engage in such pursuits, whether they comport with the Constitution. Accordingly, the petitioner implores this Honorable Court to grant the present petition and give guidance to law enforcement officials, the lower courts and our nation's citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(17)

No. 98-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM WARDLOW, aka SAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 22, 1998
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September 10, 1995 – Complaint filed in the Circuit Court of Cook County charging Sam Wardlow with Unlawful Use of Weapon by a Felon.

September 11, 1995 – Preliminary hearing held. Finding of Probable Cause.

September 14, 1995 – Information filed in the Circuit Court of Cook County charging Sam Wardlow with two counts of Unlawful Use of Weapon by a Felon and two counts of Unlawful Use of Weapon.

October 11, 1995 – Motion to Suppress Physical Evidence filed by Sam Wardlow.

October 25, 1995 – Hearing held on Motion to Suppress Physical Evidence.

December 5, 1995 – Arguments heard on Motion to Suppress Physical Evidence. Motion denied. Bench trial. Finding of guilty. Sentencing.

December 19, 1995 – Notice of Appeal to Illinois Appellate Court filed by Sam Wardlow.

March 18, 1997 – Published opinion of the Illinois Appellate Court, First District, Second Division.

September 24, 1998 – Published opinion of the Illinois Supreme Court.

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE	)	Indictment
STATE OF ILLINOIS	)	No. 95-CR-26952
	)	Before:
vs	)	JUDGE FRED G. SURIA
	)	Wednesday,
SAM WARDLOW	)	October 25, 1995.

Court having reconvened pursuant to adjournment.

APPEARANCES:

HON. JACK O'MALLEY,
State's Attorney of Cook County, by
MR. ROBERT HEILINGOETTER,
Assistant State's Attorney,
appeared for the People;

MS. RITA FRY,
Public Defender of Cook County, by
MS. IRENE CAVANAUGH,
Assistant Public Defender,
appeared for the defendant.

* * *

(p. A-3) THE CLERK:

The People of the State of Illinois versus Sam Wardlow.

(Defendant present.)

THE COURT: Any opening remarks petitioner wishes to make?

MS. CAVANAUGH: I have no opening statement to make.

THE COURT: Any opening remarks the state wishes to make?

MR. HEILINGOETTER: No, Judge.

THE COURT: This is a motion to quash arrest and suppress evidence?

MR. HEILINGOETTER: I believe just a motion to suppress evidence, correct.

MS. CAVANAUGH: Yes.

THE COURT: Petitioner may call their first witness.

MR. HEILINGOETTER: We have both Nolan and Harvey. Officer Nolan is present in court now. Officer Harvey stepped in the back.

THE COURT: Who do you wish to take the stand?

MS. CAVANAUGH: Officer Nolan.

(Witness sworn.)

(p. A-4) TIMOTHY NOLAN,

a witness called on behalf of the Petitioner, on the motion, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Ms. Cavanaugh:

Q Would you state your name, please?

A Officer Timothy Nolan, N-o-l-a-n, Star 2558, assigned to the Special Operations Section of the Chicago Police Department.

Q Officer Nolan, were you a police officer on September 9, 1995?

A Yes, I was.

Q And where were you assigned on that date?

A Special Operations Section. That particular date I was assigned to the 11th District.

Q Were you working in uniform or plain clothes?

A Uniform.

Q Were you working with a partner?

A Yes, I was.

Q And who was your partner?

A Officer Harvey.

Q And were you driving a marked or an unmarked car?

(p. A-5) A I don't recall that. It changes from day to day.

Q Now, on September 9, 1995, in the vicinity of 4036 West Congress, did you see someone in the area that is in court today?

A Yes, I do.

Q And who is that?

A The subject to the right in the Department of Corrections khakis.

THE COURT: The identification by the witness of Sam Wardlow.

MS. CAVANAUGH: Q Thank you, your Honor. And do you now know his name to be Sam Wardlow, is that correct?

A Yes, I do.

Q Now, Officer, on that date, time, and place when you saw Mr. Wardlow on the street, was he violating any laws of the City of Chicago?

A Not at the time, no.

Q At that time when you first saw him, was he violating any laws of the State of Illinois?

A Not at that time, no.

Q How about any laws of the United States of America?

(p. A-6) A No.

Q When you saw Mr. Wardlow, what was he doing?

A He was looking in our direction and he began running.

Q He was looking in your direction, but you could not say for sure he was looking at you, is that correct?

A He was looking at us.

Q He was looking in your direction, however, right?

A Yes.

Q And at that time when he started running, now running is not against the law, is it?

A No, it's not.

Q So he was still not violating any laws that you know of at that time?

A No, he wasn't.

Q What did you do at that point, Officer?

A I began driving southbound down the street observing him running through the gangway and the alley southbound.

Q And did you catch up with Mr. Wardlow at some point?

A Yes, I did.

(p. A-7) Q And what happened when you did that?

A I placed a stop on him to conduct a field interview.

Q At that time did you announce your office?

A Pardon me?

Q At that time that you put the stop on him when you caught up with Mr. Wardlow, did you announce your office at that time?

A No, I didn't.

Q What did you do?

A I conducted a protective pat down for my own safety.

Q Before you did that pat down, did you ask Mr. Wardlow any questions?

A Not initially, no.

Q So you got out of your car and you did the protective pat down?

A Correct.

Q And did you find something on or about Mr. Wardlow's person?

A Yes, I did.

Q And what did you find?

A I discovered a revolver that was wrapped in a plastic bag under his arm.

(p. A-8) Q Was this a clear plastic bag?

A No, it wasn't.

Q It was a white opaque bag?

A Yes, it was.

Q And you could not see in that bag what was in that bag before you opened it or felt what was in that bag, could you?

A No, ma'am, I felt it. It appeared to be a weapon.

Q Right, but you could not see before you felt it?

A No.

Q And at that time did you place Mr. Wardlow under arrest?

A Yes, I did.

MS. CAVANAUGH: I have no further questions.

THE COURT: State?

CROSS EXAMINATION

By Mr. Heilingoetter:

Q Officer, where was the defendant when you first observed him on that date?

A He was standing approximately in front of 4035 West Van Buren.

Q And let me ask you, Officer, why was it that

(p. A-9) you went to that location on that date and time?

A It's one of the areas in the 11th District that's high narcotics traffic.

Q How many partners or police officers went to that location along with you on that date and time?

A Including my partner and myself, there were eight of us altogether.

Q And eight police officers, how many different police cars?

A Four.

Q And you stated you and your partner, Officer Harvey, were in your vehicle?

A Yes, we were. We were the last ones.

Q What was the purpose for having four cars all converge on that same location on that date and time?

A Because of the large amount of people. Normally in these different areas there's an enormous amount of people, sometimes lookouts, customers.

Q And it was your assignment on that day, you and the other four police cars that converged on this area, to try to investigate narcctics sales in that area?

A Yes, sir.

Q Did all the four police cars arrive on the

(p. A-10) scene at the same time?

A Yes, we were all caravaning eastbound down Van Buren.

Q And was it at that time that you were caravaning down Van Buren that you first observed the defendant you have identified in court?

A Yes, sir.

Q And what specifically did he do when you first saw him?

A He looked in our direction and began fleeing.

Q And when he began to flee, what did you do?

A I also turned southbound going towards Congress, observing him as he was running southbound.

Q Did you observe anything in his hands at that time?

A No, sir. It was a white bag under his arm.

Q Was it under his arm the whole time as he ran?

A Well, from the times that I saw him, yes, it was.

Q And you were eventually able to corner him in the vicinity of 4036 West Congress?

A Yes, sir, on the street.

Q How was it that you were able to stop him at that location?

(p. A-11) A He ran right towards us.

Q And what happened at that time?

A I exited my car and did a protective pat down.

Q And you stated that when you exited your car you were dressed in police uniform similar to how you're dressed today?

A Yes, sir.

Q Meaning that you had your badge and your name tag and your police—Chicago Police Department patch on your arm?

A I was in full uniform, yes, sir.

Q And as you approached him, you did a protective search which included the bag that you saw under his arm?

A Yes, sir, I squeezed the bag.

Q And when you squeezed the bag, what did you feel?

A I felt a hard object that had a similar shape to a revolver or a gun. It was very heavy.

Q How long have you been a Chicago police officer?

A Almost nine years.

Q And in the course of your nine years, are you familiar with the different size and shapes of

(p. A12) handguns?

A Yes, sir.

Q And when you felt this bag from the outside, what did you believe it to be?

A I believed it to be a weapon.

Q Will you describe this plastic bag that this—that you recovered the gun in?

A It was a white opaque bag, not as thin as a grocery bag, more like a heavy like a Gap bag or a jean bag, you know, that stores would give out, a heavier plastic bag.

Q Were there any other items inside the bag that you were able to feel other than the gun?

A No, sir, there was nothing else in there.

Q And after you felt that from the outside of the bag and believed it to be a gun, what did you do?

A I looked inside the bag and found it to be that.

Q It was in fact a .38 caliber handgun?

A Yes, sir.

Q Colt model. Did you check the gun to see whether or not it was loaded?

A Yes, sir.

Q And it in fact had five live rounds, isn't this

(p. A-13) correct?

A Yes, sir, it did.

Q In your experience, Officer, of investigating narcotics areas in which narcotics are sold, is it common for there to be weapons in the near vicinity?

A Yes.

MS. CAVANAUGH: Objection.

THE COURT: I'll let the witness answer.

THE WITNESS: Yes, sir, it is common.

MR. HEILINGOETTER: Q Is that something that you and your fellow officers contemplated as you approached on that specific scene on that date and time?

A Yes, sir.

MR. HEILINGOETTER: Nothing further.

THE COURT: Anything further?

MS. CAVANAUGH: No more.

THE COURT: Thank you.

(Witness excused.)

THE COURT: Petitioner, do you wish to offer any additional evidence?

MS. CAVANAUGH: No other additional evidence.

THE COURT: Does the state respondent wish to offer any additional evidence?

(p. A14) MR. HEILINGOETTER: No, Judge.

THE COURT: Both sides having rested, petitioner may argue.

* * * *

(p. A17) THE COURT: It is unfortunate we in America don't realize the rights we're giving up in order to protect ourselves from this very kind of situation whereby guns and narcotics, being the nature that they are, can be so secreted away and the only way to obtain them is by the roundups and pat downs of fellow citizens.

This affects the rights of all of us. On the other hand, if we wish to get the guns and the drugs off, there's no other way to do it and that's the way the police were attempting to do it in this case.

It is, however, my humble judgment the law does not allow it at this point, so if the state feels they have any cases that would show otherwise, I'll be glad to continue it to 12/6 and we'll see where we

(p. A18) are.

MR. HEILINGOETTER: Judge, I would like that opportunity.

THE COURT: By agreement, 12/6.

MR. HEILINGOETTER: Judge, did the court actually make a ruling on the motion?

THE COURT: I'll reserve my ruling.

(A continuance was taken to December 6, 1995.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS	)	Indictment No. 95-CR-26952
	)	Before:
vs	)	JUDGE FRED G. SURIA
SAM WARDLOW	)	December 6, 1995

Court having reconvened pursuant to adjournment.

APPEARANCES:

HON. JACK O'MALLEY,
State's Attorney of Cook County, by
MS. MARIA BURNETT &
MR. ROBERT HEILINGOETTER,
Assistant State's Attorneys,
appeared for the People;

MS. RITA FRY,
Public Defender of Cook County, by
MS. IRENE CAVANAUGH,
Assistant Public Defender,
appeared for the defendant.

* * *

(p. B12) THE COURT:

That is what they are saying.

You have to take it in connection with the appropriate sections and they relate the appropriate sections to

this case where the police already before they make the stop have their specific and articulable facts. The police in Mr. Wardlow's case had nothing.

It is common knowledge police do know of the area where drugs are being sold. They do have knowledge of general areas where contraband, including weapons, are being carried.

I appreciate we don't have a general warrant situation. There's no warrant at all as a

(p. B13) matter of fact in this case. I do believe we are attempting to control what's happening on our streets. There's no alternative but to suggest police do have a right to drive up to an area, in this case the defendant looking in the direction of the police officers. Almost anybody can identify a police car marked or obviously unmarked just as obviously.

And, this was a white officer as well in a black area. Under all at attendant circumstances when the defendant realized the circumstances for which they are there does in fact flee. I think they do have a right to stop and question and in doing so have a right to protect themselves by a patdown.

I would respectfully deny the defense motion to suppress the facts. I will note your objection.

MS. CAVANAUGH: I think it's clearly against the law, your Honor.

THE COURT: I understand.

MS. CAVANAUGH: I would ask—

THE COURT: A shame we have to do this, but I know no other alternative.

MS. CAVANAUGH: I don't think going against the Constitution is a proper alternative.

(p. B14) THE COURT: It's within the framework of the Constitution and always been observed in light of what's going on in fact.

MS. CAVANAUGH: I think just because it's practice doesn't make it right.

THE COURT: I agree. Practice does not make it right. I also agree there's urgency on the streets and we are not—this is one method of doing so of trying to confront that. And, once a person flees after having looked in the direction of the officer there's reasonable—there's reason to think there's a problem, they have a right to make inquiry.

MS. CAVANAUGH: Without nothing more specific than that there is no right. That's a police state.

THE COURT: They were going to an area where there was in fact drugs being sold. We know—

MS. CAVANAUGH: That's my neighborhood, too. If I walk away from the police they can stop me?

THE COURT: I think they ought to stop and do so if you were to run.

Be that as it may we are in disagreement.

Opinion of the Illinois Supreme Court
Docket No. 83061-Agenda 7-May 1998.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. SAM WARDLOW, Appellee.

JUSTICE HARRISON delivered the opinion of the court:

Defendant, Sam Wardlow, was convicted of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 1994)) following a stipulated bench trial in Cook County and was sentenced to a term of two years' imprisonment. On appeal, the appellate court reversed defendant's conviction, finding that defendant's motion to suppress evidence should have been granted because the revolver seized from him was discovered as a result of an improper investigatory stop. 287 Ill. App. 3d 367. We allowed the State's petition for leave to appeal. 166 Ill. 2d R. 315(a); 145 Ill. 2d R. 604(a)(2).

At the hearing on defendant's motion to suppress, Officer Timothy Nolan testified that on September 9, 1995, he and his partner, Officer Harvey, were assigned to the special operations section of the Chicago police department. On that date, Nolan and Harvey were among eight officers in four cars travelling eastbound on West Van Buren Street with the purpose of investigating narcotics sales in that area. Nolan stated that he was working in uniform, but did not recall whether the police car he drove, the last in the "caravan," was marked or unmarked.

Nolan testified that as he was driving, he observed defendant standing in front of 4035 West Van Buren. Defendant, who did not appear to be violating any laws,

looked in the officers' direction and then fled. Nolan turned his vehicle southbound toward Congress Avenue, continuing to observe defendant, who ran southbound through a gangway and then through an alley. Nolan stated that defendant, who was carrying a white opaque bag under his arm, was cornered in the vicinity of 4036 West Congress when he "ran right towards us."

Nolan exited his car and stopped defendant. Without announcing his office or asking any questions, he conducted a protective pat-down search of defendant. Nolan testified that he could not see inside the bag defendant was carrying so he "squeezed" the bag and felt a very heavy, hard object "that had a similar shape to a revolver or a gun." Believing the object to be a weapon, Nolan opened the bag and found a .38-caliber handgun containing five live rounds of ammunition. Nolan then placed defendant under arrest.[1]

Responding to the State's question as to why he "went to that location on that date and time," Nolan answered that it was "one of the areas in the 11th District that's high narcotics traffic." Nolan further testified that, based upon his experience in investigating areas in which narcotics were sold, it was common for there to be weapons "in the near vicinity" and he considered that fact as he approached "that specific scene." After hearing arguments by the parties, the trial court denied defendant's motion to suppress.

Generally, a trial court's ruling on a motion to suppress evidence is subject to reversal only if manifestly

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[1] While no testimony was presented as to the precise time of defendant's arrest, the record contains Nolan's arrest report, which indicates a time of 12:15 p.m.

erroneous. *People v. Dilworth*, 169 Ill. 2d 195, 201 (1996). This clearly erroneous or manifestly erroneous test is based on the understanding that suppression motions usually raise mixed questions of law and fact. See *People v. Frazier*, 248 Ill. App. 3d 6, 12 (1993). However, where, as here, neither the facts nor the credibility of the witnesses is contested, the determination of whether there is reasonable suspicion warranting an investigatory stop is a legal question which a reviewing court may consider *de novo*. See *In re D.G.*, 144 Ill. 2d 404, 408-09 (1991); *People v. Foskey*, 136 Ill. 2d 66, 76 (1990); see also *People v. Besser*, 273 Ill. App. 3d 164, 167 (1995).

The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. This provision applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 614, 95 S. Ct. 2574, 2578 (1975); *People v. Smithers*, 83 Ill. 2d 430, 433-34 (1980). In *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), the United States Supreme Court held that the public's interest in effective law enforcement makes it reasonable to detain and question individuals under certain circumstances in which probable cause to arrest is lacking. However, in order to protect "the individual's right to personal security free from arbitrary interference by law officers" (*Brignoni-Ponce*, 422 U.S. at 878, 45 L. Ed. 2d at 615, 95 S. Ct at 2579), the *Terry* Court held that such limited investigatory stops are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person has committed, or is about to commit, a crime. *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880; *Smithers*, 83 Ill. 2d at 434.

This *Terry* standard has been codified in our Code of Criminal Procedure of 1963. *People v. Flowers*, 179 Ill. 2d 257, 262 (1997); *People v. Long*, 99 Ill. 2d 219, 228 (1983). Section 107-14 of the Code provides, in pertinent part: "A peace officer * * * may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense * * *." 725 ILCS 5/107-14 (West 1994). The same standard is applied in determining the propriety of an investigatory stop under article I, section 6, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §6). See *People v. Tisler*, 103 Ill. 2d 226, 242-43 (1984) (the protection against unreasonable searches and seizures under the Illinois Constitution is measured by the same standards as are used in defining the protections contained in the fourth amendment to the United States Constitution).

Turning to the case before us, defendant contended on direct appeal that the trial court erred in denying his motion to suppress because his presence in a high-crime area and flight from police were insufficient to justify his investigatory stop. The appellate court agreed, but found the record "simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking" and limited its holding accordingly. 287 Ill. App. 3d at 370-71. However, we believe Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was

sufficient to establish that the incident occurred in a high-crime area. See *Ornelas v. United States*, 517 U.S. 690, 699, 134 L. Ed. 2d 911, 920, 116 S. Ct. 1657, 1663 (1996) (as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal, but reviewing court should take care both to review findings of fact only for clear error and to give due weight to inferences drawn from those facts by judges and local law enforcement officers). Thus, the issue presented by this appeal is whether an individual's flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop of the person. Defendant contends that such flight alone is insufficient to create a reasonable suspicion of involvement in criminal conduct. We agree.

A majority of jurisdictions addressing this issue have held that flight alone is insufficient to justify a *Terry* stop. See, e.g., *State v. Tucker*, 136 N.J. 158, 642 A.2d 401 (1994); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992); *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Aldridge*, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983); *Watkins v. State*, 288 Md. 597, 420 A.2d 270 (1980). "Instead, courts require proof of some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight at the sight of the police. [Citations.]" *Hicks*, 241 Neb. at 362-63, 488 N.W.2d at 363; see also *Tucker*, 136 N.J. at 169, 642 A.2d at 407 (for departure to take on the legal significance of flight, there must be some circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pur-

suant to an effort to avoid an accusation based on that guilt).

In *Hicks*, the Nebraska Supreme Court examined a number of these "location plus evasion" cases and, in a well-reasoned opinion, concluded:

> "[A]llowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while a police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer some questions, neither is the person under any obligation to answer. *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The person may decline to listen to the questions at all and simply go on his or her way. Id. If the option to 'move on' is chosen, the person 'may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.' 460 U.S. at 498.
>
> * * * Flight upon approach of a police officer may simply reflect the exercise-'at top speed'-of the person's constitutional right to '"move on."' *Shabaz*, 424 Mich. at 63, 378 N.W.2d at 460. *Terry* and *Royer* stand for the proposition that exercise of this constitutional right may not itself provide the basis for more intrusive police activity.
>
> * * *

> A prime concern underlying the *Terry* decision is protecting the right of law-abiding citizens to eschew interactions with the police. Authorizing the police to chase down and question all those who take flight upon their approach would undercut this important right and upset the balance struck in *Terry* between the individual's right to personal security and the public's interest in prevention of crime. We therefore join those jurisdictions holding that flight from a police officer is sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct. [Citations.]" *Hicks*, 241 Neb. at 363-64, 488 N.W.2d at 363-64.

Although no Illinois court has specifically considered whether sudden flight from police in a high-crime area justifies a stop, we agree with the appellate court that "[i]n Illinois, neither a person's mere presence in an area where drugs are sold (*People v. Harper*, 237 Ill. App. 3d 202, 205, 603 N.E.2d 115 (1992)) nor sudden flight (*People v. Rivera*, 233 Ill. App. 3d 69, 77, 598 N.E.2d 423 (1992)) alone will justify a *Terry* stop." 287 Ill. App. 3d at 370; see also *People v. Fox*, 97 Ill. App. 3d 58 (1981) (driving away at approach of marked police vehicle not a justification for stop). Moreover, this court has recently emphasized the importance of protecting the freedom to engage in such harmless activities as "loafing, loitering, and nightwalking" and other personal liberties of citizens, including the right to travel, to locomotion, to freedom of movement, and to associate with others. *City of Chicago v. Morales*, 177 Ill. 2d 440, 459-60 (1997), cert. granted, ___ U.S. ___, 140 L. Ed. 2d 664, 118 S. Ct. 15.

In *Morales*, we found that a City of Chicago ordinance which prohibited certain individuals from loitering in public places violated substantive due process because it unreasonably infringed on "the personal liberty of being able to freely walk the streets and associate with friends." *Morales*, 177 Ill. 2d at 460-61. We find similarly unreasonable the State's proposal, in the instant case, that every person observed in "sudden and unprovoked flight" from an officer may be stopped regardless of whether the surrounding circumstances indicate the person is involved in criminal activity. Cf. *People v. Holdman*, 73 Ill. 2d 213 (1978) (defendants' flight following officers' shining bright light into vehicle they reasonably believed to be associated with fugitive for whom they had warrant was indication of criminal activity requiring police pursuit). As defendant suggests, "[i]f the police cannot constitutionally force otherwise law-abiding citizens to move, the police cannot force those same citizens to stand still at the appearance of an officer." Therefore, because we agree with the majority of courts that view the unequivocal flight of a suspect upon seeing police as not alone indicative of criminal activity, we now examine the record herein to determine if there are corroborating circumstances sufficient to create the reasonable suspicion necessary for the stop of defendant.

The case before us is factually similar to *People v. Mamon*, 173 Mich. App. 429, 435 N.W.2d 12 (1988), rev'd on other grounds, 435 Mich. 1, 457 N.W.2d 623 (1990). There, two police officers were driving on routine patrol in a marked squad car through an area known for narcotics activity. As the officers approached the defendant, Mamon, standing on a corner near a

public phone, he took off running. The officers pursued the defendant on foot, noticing that he removed a case from his pocket and dropped it during the chase. The officers ultimately caught the defendant and retrieved the case, which contained cocaine. The trial court quashed an information charging the defendant with possession of a controlled substance, and the State appealed.

The Michigan appeals court affirmed the trial court's decision, first addressing the circumstances existing before the defendant began to run. Though the incident occurred in a high-crime neighborhood, the court determined that a person's presence in such an area cannot, by itself, provide the basis for an investigatory stop. In so doing, the court noted that the officers were not responding to a particular complaint of wrongdoing in the area and that the defendant made no furtive gestures prior to seeing the officers. Concluding that the officers lacked an articulable basis for stopping the defendant as he stood on the corner, the court turned to the significance of his flight upon their approach. Noting the ambiguous nature of flight as an indicator of guilt, the court held that the act of running at the sight of police patrolling a high-crime area did not provide the particularized grounds necessary to support a reasonable suspicion that criminal activity was afoot. *Mamon*, 173 Mich. App. at 435-38, 435 N.W.2d at 14-16.

Here, similar to *Mamon*, Officers Nolan and Harvey were "caravaning" with several other police vehicles when the incident occurred. They were not responding to any call or report of suspicious activity in the area. Though Officer Nolan testified that that area of the

11th District is known for "high narcotics traffic," we agree with our appellate court's opinion in *Harper*, 237 Ill. App. 3d at 205-06, and the numerous decisions from other jurisdictions, holding that a person's presence in such an area by itself does not warrant a suspicion that that person is involved in crime. See *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979); *Hicks*, 241 Neb. at 366, 488 N.W.2d at 365; *Shabaz*, 424 Mich. at 60, 378 N.W.2d at 459; see also *In re D.J.*, 532 A.2d 138, 143 (D.C. App. 1987) (innocent activities do not become sinister by the mere fact that they take place in a high-crime area).

It is also clear that defendant herein gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan's vehicle. Defendant was simply standing in front of a building when the officers drove by. As in *Mamon*, the officers lacked an articulable basis for suspecting defendant of involvement in criminal activity prior to the point at which he turned and ran.

In *Fox*, the Illinois case which most closely approximates the issue presented herein, the appellate court foreshadowed our concerns, stating:

> "At the time of the stop, the investigating officers were aware that 'partying and littering' had recently occurred in the * * * area and also that the vehicle in which the defendant was riding as a passenger exited the area at a speed which one officer believed to be unreasonable upon the approach of a squad car. But, the officers testifying on behalf of the State did not relate that *any additional suspicious or unusual activities* that would have alerted the police to

the possibility of criminality were carried on by the occupants of the automobile. * * *

* * *

In short, the evidence adduced in this case does not support the State's contention that the police were aware of specific and articulable facts to justify the stop here. Rather, the evidence suggests that the police officers were operating under a suspicion or hunch that the vehicle contained someone who had committed or was about to commit a crime." (Emphasis added.) *Fox*, 97 Ill. App. 3d at 63-64.

Here, as in *Fox*, in the absence of circumstances corroborating the conclusion that defendant was involved in criminal activity, Officer Nolan's testimony reveals nothing more than a hunch.

As our brethren on the Supreme Court of Colorado have so aptly stated:

"We are aware that the weighty social objective of crime prevention might well be served by permitting stops and detentions without any requirement of a reasonable suspicion that criminal activity has occurred or is about to take place. In the absence of specific and articulable facts supporting the reasonable suspicion, however, 'the balance between the public interest and [defendant's] right to personal security and privacy tilts in favor of freedom from police interference.' *Brown v. Texas*, [443 U.S.] at 52, 99 S. Ct. at 2641, 61 L. Ed. 2d at 363." *Thomas*, 660 P.2d at 1277.

Where, as here, the police stop is not based upon objective criteria pointing to a reasonable suspicion of criminal activity, "the risk of arbitrary and abusive

police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. at 52, 61 L. Ed. 2d at 363, 99 S. Ct. at 2641.

Therefore, because Officer Nolan was not able to point to specific facts corroborating the inference of guilt gleaned from defendant's flight, his stop and subsequent arrest of defendant were constitutionally infirm. U.S. Const., amend. IV; Ill. Const 1970, art. I, §6. The appellate court, therefore, properly reversed the trial court's denial of defendant's motion to suppress evidence. The weapon that was the basis for defendant's conviction should have been suppressed as the product of the unconstitutional seizure of his person. *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455, 83 S. Ct. 407, 417 (1963).

For the foregoing reasons, the judgment of the appellate court, reversing the judgment of the circuit court, is affirmed.

Appellate court judgment affirmed.

Opinion of The Appellate Court of Illinois
First District, Second Division
No. 1-96-0094, Filed March 18, 1997

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	No. 95 CR 26952
v.	)	The Honorable Fred Suria, Judge Presiding
SAM WARDLOW,	)	
Defendant-Appellant.	)	

JUSTICE DiVITO delivered the opinion of the court:

Following a bench trial, defendant Sam Wardlow was found guilty of unlawful use of a weapon by a felon and was sentenced to two years' imprisonment. The sole issue in this appeal is whether the circuit court erred in denying defendant's motion to suppress the gun that was seized from him during an investigatory stop. For the reasons that follow, we conclude that defendant's motion to suppress should have been granted and we reverse his conviction.

At the hearing on defendant's motion to suppress, Officer Timothy Nolan testified that on September 9, 1995, he and his partner, Officer Harvey, were assigned to the special operations section of the Chicago police department. They were among eight officers in four cars who were driving eastbound on West Van Buren. Officer Nolan's car was last in the line of vehicles driving in the area. Although Officer Nolan could not recall whether his car was marked, he and his partner were in uniform. There was no evidence concerning

whether any of the other cars were marked or concerning the clothing of the other officers.

The cars were "caravaning" eastbound down Van Buren, when Officer Nolan observed defendant, who was not violating any laws, standing near the front of 4035 West Van Buren Street. Defendant looked in the officers' direction, then fled. Holding a white bag under his arm, he ran through a gangway and then through an alley. Officer Nolan drove south, observing defendant as he ran. Near 4036 West Congress, defendant ran towards him.

Officer Nolan exited his car and stopped defendant. Without announcing his office or asking any questions, he conducted a protective pat-down search of defendant. He could not see inside the plastic bag that defendant was carrying. He patted the outside of the bag and "felt a hard object that had a similar shape to a revolver or a gun." Officer Nolan believed the object, which was very heavy, to be a weapon. He looked inside the bag and found a .38-caliber handgun containing five live rounds of ammunition. He then placed defendant under arrest.

Officer Nolan testified that he and the other officers had gone to the area because it was "one of the areas in the 11th District that's high narcotics traffic." Based upon his experience with investigation of areas in which narcotics are sold, Officer Nolan knew that it was common to find weapons in the vicinity of such areas.

The police report indicated that defendant, who was 44 years old, was arrested at 12:15 p.m.

The circuit court denied the motion to suppress. A stipulated bench trial followed, and defendant was

found guilty of unlawful use of a weapon by a felon and was sentenced to a two-year term of imprisonment.

In this appeal, defendant contends that the circuit court erred in denying his motion to suppress because his presence in a high crime area and flight from the police officers were insufficient to justify his investigatory stop. We note that although no Illinois court has considered whether sudden flight from police officers in a high crime area justifies a stop, other jurisdictions are divided on the question. Compare *Harris v. State*, 205 Ga. App. 813, 423 S.E.2d 723 (1992), and *State v. White*, 660 So. 2d 515 (La. Ct. App. 1995) (flight from police officers in high crime area justifies investigatory stop), with *People v. Holmes*, 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993), *affirmed*, 89 N.Y.2d 838 (1996), *Hopkins v. State*, 661 So. 2d 774 (Ala. Crim. App. 1994), *Britt v. State*, 673 So. 2d 934 (Fla. App. 1996), and *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992) (flight from police officers in high crime area does not justify stop).

Where, as here, there is no challenge to the facts or the credibility of the witnesses, we review a motion to suppress *de novo*. *People v. Foskey*, 136 Ill. 2d 66, 76, 554 N.E.2d 192 (1990); *Ornelas v. United States*, 517 U.S. 690, 700, 134 L. Ed. 2d 911, 920, 116 S. Ct. 1657, 1663 (1996).

Under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) (codified at 725 ILCS 5/107-14 (West 1994)), a police officer may stop and detain a person for temporary questioning if the officer reasonably infers from the situation that the person is committing, is about to commit, or has committed a crime. *Terry*, 392 U.S. at 22, 20 L. Ed. 2d at 906-07, 88 S. Ct. at 1880. To justify an investigatory stop, the police officer must be

able to point to specific and articulable facts that reasonably warrant the intrusion. *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880. In determining whether a stop is reasonable, the court employs an objective standard: would an officer of reasonable caution, knowing the facts available at the time of the stop, believe the action was appropriate? *People v. Rivera*, 272 Ill. App. 3d 502, 504-05, 650 N.E.2d 1084 (1995), *appeal denied*, 164 Ill. 2d 577, 660 N.E.2d 1277 (1995).

In Illinois, neither a person's mere presence in an area where drugs are sold (*People v. Harper*, 237 Ill. App. 3d 202, 205, 603 N.E.2d 115 (1992)) nor sudden flight (*People v. Rivera*, 233 Ill. App. 3d 69, 77, 598 N.E.2d 423 (1992)) alone will justify a *Terry* stop. Past criminal activity in an area (*People v. Hunt*, 188 Ill. App. 3d 359, 362, 544 N.E.2d 118 (1989), *appeal denied*, 128 Ill. 2d 668, 548 N.E.2d 1074 (1989)) and flight (*Rivera*, 233 Ill. App. 3d at 77), however, are relevant factors to be considered in determining whether circumstances justify an investigatory stop.

For example, in *People v. Rivera*, 233 Ill. App. 3d 69, 76-77, 598 N.E.2d 423 (1992), police officers entered the defendant's bar, having received information that cocaine was stored in the basement and the defendant was involved in its sale and distribution. According to the testimony of the police officers, the defendant appeared frightened and fled when they entered the bar. *Rivera*, 233 Ill. App. 3d at 77. The court found that the flight of defendant, combined with the information known to the officers, provided the requisite reasonable suspicion. *Rivera*, 233 Ill. App. 3d at 77.

From the record before us, we cannot discern the precise location of the area known by the officers to have

a high incidence of narcotics trafficking. After he testified that he noticed defendant at 4035 West Van Buren, Officer Nolan was asked why he went to that area. He responded that it was one of the areas in the 11th District that had "high narcotics traffic." His testimony indicates only that the officers were headed somewhere in the general area. There was no evidence that the officers were investigating the specific area where defendant had been standing or that any of the police cars had stopped at that location or that defendant had any basis for believing that police were interested in his activity.

Officer Nolan testified that he was "caravaning" down West Van Buren when he noticed defendant. He did not testify that the officers were targeting 4035 West Van Buren because it was known to be a location where drugs were sold. From the evidence elicited at the hearing on the motion to suppress, it appears that the officers were simply driving by, on their way to some unidentified location, when they noticed defendant standing at 4035 West Van Buren. The record here is simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking or, for that matter, that defendant's flight was related to his expectation of police focus on him.

Because we find no support in the record for the contention that defendant was in a high crime location, we are left only with the fact of his sudden flight from an area past which police officers were driving. That circumstance alone does not satisfy the requirements for a lawful investigatory stop. *Rivera*, 233 Ill. App. 3d at 77. Accordingly, the circuit court erred in denying defendant's motion to suppress.

We emphasize the limited nature of our holding. Because we recognize the importance of the police interest in investigating crime, we do not hold that the presence of a suspect in a high crime location, together with his subsequent flight from police, is never grounds for a *Terry* stop. Certainly, a "high crime area is a place in which the character of the area gives color to conduct which might not otherwise raise the suspicion of an officer." *White*, 660 So. 2d at 519. To pass constitutional muster, however, the high crime area should be a sufficiently localized and identifiable location. This limitation is necessary to "assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field," simply because he or she happens to live in a neighborhood where crime is prevalent. *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362, 99 S. Ct. 2637, 2640 (1979).

Accordingly, the weapon that was the basis for defendant's conviction should have been suppressed because it was discovered as a result of an unjustified investigative stop. *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455, 83 S. Ct. 407, 417 (1963). Rather than remanding, we reverse defendant's conviction outright because the State will not be able to prevail without the recovered evidence. *People v. Evans*, 259 Ill. App. 3d 650, 659, 631 N.E.2d 872 (1994).

The judgment of the circuit court is reversed.

Reversed.

RAKOWSKI and McNULTY JJ., concur.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543-0001

May 3, 1999

Renee G. Goldfarb, Esq.
Assistant State's Attorney
309 Richard J. Daley Center
Chicago, Illinois 60602

Re: 98-1036 – Illinois v. Wardlow, William AKA Sam

Dear Ms. Goldfarb:

The Court today entered the following order in the above case:

> "The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted."

Enclosed are Memoranda describing the procedures under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Although this case will not be scheduled for oral argument this Term please note that requests for extensions of time to file briefs on the merits **are not** favored.

If you have any questions, please contact me.

Sincerely,

WILLIAM K. SUTER, CLERK

Denise J. McNerney
Assistant Clerk-Merits Cases
(202) 479-3032

Enclosures

Supreme Court, U.S.
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JUN 29 1999
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(8)

No. 98-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM WARDLOW, aka SAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

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QUESTION PRESENTED FOR REVIEW

Whether a person's unprovoked flight from a clearly identifiable police officer, who is patrolling a high crime area, is sufficiently suspicious to justify a temporary investigatory stop pursuant to *Terry v. Ohio*.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court, which affirmed the Illinois Appellate Court's order suppressing evidence and reversed Respondent's conviction, was entered on September 24, 1998 and is reported at 183 Ill.2d 306, 701 N.E.2d 484.

The opinion of the Illinois Appellate Court, First District, which suppressed the evidence and reversed Respondent's conviction, was entered on March 18, 1997 and is reported at 287 Ill.App.3d 367, 678 N.E.2d 65.

The order of the circuit court denying Respondent's motion to suppress is unreported.

STATEMENT OF JURISDICTION

The order and judgment of the Illinois Supreme Court was entered on September 24, 1998. No Petition for Rehearing was filed. The Petition for a Writ of Certiorari was submitted on December 22, 1998 and was granted by this Court on May 3, 1999.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides that:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent, William Wardlow, was charged with two counts of Unlawful Use of Weapon by a Felon and two counts of Unlawful Use of Weapon under Indictment Number 95-CR-26952. (CLR. C9-C14) Respondent filed a pretrial Motion to Suppress Physical Evidence and a hearing was held on this motion on October 25, 1995. (J.A. 2, CLR. C22)

The only witness called to testify at the hearing was a nine-year veteran Chicago police officer, Timothy Nolan. (J.A. 3, 10) Officer Nolan testified that he was a member of the Chicago Police Department's Special Operations Section. (J.A. 4) On September 9, 1995, he was specifically assigned to the 11th Police District. (J.A. 4)

Officer Nolan testified that one of the locations inside the 11th District that has "high narcotics traffic" is in the vicinity of 4035 West Van Buren. (J.A. 7-8) Officer Nolan stated that his specific assignment on September 9, 1995 was to investigate narcotics sales in this area of the 11th District. (J.A. 8) He also stated that, in his experience, it was common to find weapons in the vicinity where narcotics are sold. (J.A. 11)

Officer Nolan and seven other officers converged on this area in four separate cars. (J.A. 8) As these four police cars were driving east on Van Buren Street, Officer Nolan and his partner, Officer Harvey, were in the last car. (J.A.

4, 8) He could not recall if their police car was marked or unmarked. (J.A. 4) However, on that day Officer Nolan was adorned in his full police uniform which included his badge, name tag and a Chicago Police Department patch on his arm. (J.A. 9) Officer Nolan explained that the purpose for having four cars converge on the same location at the same time is because normally there is an enormous amount of people in such areas, some of whom are there as customers while others serve as lookouts. (J.A. 8)

As the officers were cruising down Van Buren Street, Officer Nolan saw Respondent standing near the front of 4035 West Van Buren Street. (J.A. 7) Respondent looked at the officers and took off running. (J.A. 5,9) Officer Nolan could see that Respondent was carrying a white opaque bag under his arm as he was running. (J.A. 7,9)

Officer Nolan drove his police car southbound toward Congress Street and observed Respondent as he was running down a gangway. (J.A. 6,9) As he kept driving, Officer Nolan then observed Respondent running through an alley. (J.A. 6) Officer Nolan and his partner were eventually able to catch up to and corner Respondent in the vicinity of 4036 West Congress Street because "[h]e ran right towards us." (J.A. 6,9)

Still dressed in uniform, with his badge, patch and name tag visible, Officer Nolan exited his vehicle and stopped Respondent for the purpose of conducting a field interview. (J.A. 6,9,10) Without announcing his office or asking Respondent any questions, Officer Nolan conducted a "protective pat-down" search "for [his] own safety." (J.A. 6) He did this by squeezing the outside of the white opaque plastic bag that Respondent was holding under his arm. (J.A. 7,10) The object that Officer Nolan felt inside the bag was hard, heavy and similar in shape to a revolver. (J.A. 10) Officer Nolan then looked inside the bag and found a Colt .38 caliber handgun loaded with five live

bullets. (J.A. 11) It was at that time that the officer placed Respondent under arrest. (J.A. 7)[1]

The parties presented their arguments to the trial court judge on October 26th and December 6th of 1995. (R. A14-A18, B5-B12) After hearing the respective arguments, the trial judge denied Respondent's suppression motion. (J.A. 14) In denying Respondent's motion, the trial judge found it common knowledge that police officers know of the areas in which drugs are being sold, and do have knowledge of the general areas where contraband, including weapons, are being carried. (J.A. 14) The judge noted that police officers have a right to drive up to these areas. The judge also observed that anybody can identify a police car, be it marked or unmarked. (J.A. 14) Under all of the attendant circumstances, including Respondent's awareness of the circumstances that brought about the officers' presence in that area and his flight upon looking in their direction, the trial judge concluded that the officers had a right to stop and question Respondent, and in doing so, they had a right to protect themselves by conducting a pat-down search. (J.A. 14) Finally, the judge noted that once a person flees, after having looked in the direction of a police officer, "there's reasons to think there's a problem [; the officers] have a right to make inquiry." (J.A. 15)

Following a stipulated bench trial, Respondent was found guilty of Unlawful Use of Weapon by a Felon and sentenced to two years imprisonment. (R. B19, B20)

---

[1] The transcript of Officer Nolan's testimony does not indicate the precise time of Respondent's arrest. However, Officer Nolan's Arrest Report, as well as the prosecutor's closing argument, indicate that Respondent was arrested at 12:15 p.m. (R.B5,CLR. C4)

SUMMARY OF ARGUMENT

In affirming the Illinois Appellate Court's suppression order, the Illinois Supreme Court held that Respondent's unprovoked flight from a clearly identifiable police officer, alone or in combination with the fact that his flight occurred in a high crime area, could never be sufficient for a temporary investigatory stop. (J.A.22,25) The Illinois Supreme Court required that flight, even in a high crime area, be corroborated by additional facts or circumstances which indicate that Respondent was involved in criminal activity before a stop could be made. (J.A.27)

Petitioner contends that a person's unprovoked flight at the mere sight of a police officer is such innately and objectively suspicious behavior that it alone justifies a temporary investigative stop. Further, even if unprovoked flight could never be alone sufficient justification for the stop, it undoubtedly would be if this flight occurred in a high crime area.

In *Terry v. Ohio*, 392 U.S. 1 (1968) this Court created a limited exception to the Fourth Amendment's probable cause requirement for seizures by providing law enforcement officials with the intermediate response of briefly stopping a suspicious individual to maintain the *status quo*, while ascertaining his identity and obtaining any additional information to verify or dispel their suspicions. The propriety of these temporary seizures is governed by the Fourth Amendment's "reasonableness" requirement.

This Court has stated that in determining the propriety of a seizure, the first inquiry is whether the law enforcement official's activity would have been regarded as a lawful seizure under the common law when our founding fathers framed the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). In the present case, even though the intermediate response permitted in *Terry* did not exist at the time the Framers wrote the Fourth

Amendment, there can be no serious dispute that, by examining certain historical writings and early opinions from this Court, the inherent suspicion attached to a person's flight not only existed in the common law at the time the Fourth Amendment was written, but could be traced back to biblical times ("The wicked flee when no man pursueth, but the innocent are as bold as a lion." Proverbs 28:1). Indeed, the common law would have regarded unprovoked flight as culpable conduct. Accordingly, the Framers would have wholeheartedly embraced the principle that a person's unprovoked flight from the authorities, standing alone, would have provided sufficient reasonable suspicion for a temporary investigatory stop.

Nevertheless, where it cannot be determined if the Framers would have considered flight to be alone sufficient for a *Terry* stop, this Court has stated that the reasonableness of the officer's action should be determined by balancing the degree to which it is needed, for the advancement of legitimate governmental interests, against the degree of this intrusion upon a person's privacy. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995). As to the governmental interest, a person's unprovoked flight at the mere sight of a policeman undeniably demonstrates and exposes that person's consciousness of guilt and is a sure signal that criminal activity may be afoot. Accordingly, in the interest of crime detection and prevention, an officer should be entitled to briefly stop that person and make inquiry. Further, a person's unprovoked flight can precipitate a street pursuit which will place the officers, the suspect and the general public at risk. Thus, such flight should be discouraged.

On the other hand, a *Terry* stop is a minimal intrusion upon a suspect's privacy interest because it typically occurs in a public place as opposed to the home. Further, the stop is typically brief and merely consists of the officer asking questions to confirm or dispel his suspicions. Accordingly, on balance, the Government's interest in fostering good police work and facilitating the prevention and detection of crime outweighs a person's privacy interest.

Finally, even if it is determined that unprovoked flight can never alone justify a *Terry* stop, the fact that the flight occurs in a high crime location provides a sufficient amalgam of facts to support the temporary investigative stop. This Court has long observed that location is a highly relevant factor in determining the propriety of a seizure. This observation has been echoed by several lower courts as well as commentators. The term "high crime area" is not arbitrary or ephemeral because it can be quantitatively verified. Accordingly, when unprovoked flight occurs in a location plagued by high crime, then these two factors should be sufficient to justify a *Terry* stop.

ARGUMENT

A PERSON'S UNPROVOKED FLIGHT FROM A CLEARLY IDENTIFIABLE POLICE OFFICER, WHO IS PATROLLING A HIGH CRIME AREA, IS SUFFICIENTLY SUSPICIOUS TO JUSTIFY A TEMPORARY INVESTIGATORY STOP PURSUANT TO *TERRY v. OHIO*.

A.

Respondent's Unprovoked Flight From A Clearly Identifiable Police Officer Was Sufficient, Standing Alone, To Warrant A Temporary Investigatory Stop Under The Fourth Amendment.

One of the crucial questions presented to this Court is whether a person's unprovoked flight upon seeing a clearly identifiable police officer, standing alone, justifies an investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). As evidenced by *Terry* and other Fourth Amendment authority, the legality of a seizure must be scruti-

nized from the point of view of a reasonable police officer.[2] Petitioner contends that, when viewed from the perspective of a reasonable police officer, an individual's unprovoked flight at the sight of the police is not only unusual, but innately and objectively suspicious behavior that justifies a temporary investigatory stop.

However, in order to effectively conduct an analysis that stems from the point of view of a police officer, it is important to attain a firm understanding of that unique perspective. During a routine patrol, a uniformed police officer will encounter countless citizens on a daily basis. Certainly, an officer who works the day shift in an urban community, like Chicago, passes by hundreds of citizens. In most instances, an officer's encounter with a citizen is uneventful. A citizen's reaction to a uniformed police officer typically constitutes a glance. Those citizens, who feel reassured by the presence of the police in their community, may even greet an officer. Others, who are distrustful, may avoid eye contact or even sneer at the sight of an officer. However, most citizens, regardless of their personal attitude toward the police, do not react by fleeing at the mere sight of a clearly identifiable police officer. A person's unprovoked flight from a police officer is such an extreme reaction that it unquestionably falls outside the boundaries of normal human conduct. Moreover, such a reaction constitutes aberrant behavior whether it takes place in an urban or rural setting. Thus, from the objective point of view of *any* reasonable police officer, applying a common sense conclusion about human behavior, such an abnormal reaction is highly suspicious requiring an investigation.

---

[2] *See Terry*, 392 U.S. at 21-22; *United States v. Cortez*, 449 U.S. 411, 418 (1981); *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985); *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989).

The issue presented to this Court does not address an attempt to simply avoid the police, but rather an individual's decision to take flight upon the mere sight of a clearly identifiable police officer. The avoidance of the police is a general factual category that includes a wide spectrum of conduct.[3] A person who avoids eye contact with the police falls at one end of the spectrum. Of course, such conduct alone cannot give rise to an inherent suspicion justifying a temporary investigatory stop. In the middle of the spectrum lie those instances where a person turns around or walks away to avoid contact with the police. Again, such acts of avoidance would certainly require support from other suspicious factors in order to justify a temporary investigatory stop. However, running away from a clearly identifiable police officer belongs on the opposite end of the spectrum and constitutes an innately suspicious reaction to the presence of police.[4]

Indeed, flight is defined as: "the act of fleeing or escaping from danger," *Funk & Wagnalls Standard Desk Dictionary*, 243 (1989); "the act or instance of running away; an escape," *The American Heritage College Dictionary*, 3rd Ed. 520 (1993); "an act or instance of running away," *Webster's Ninth New Collegiate Dictionary*, 473 (1988); "to flee; to disappear quickly," *Chambers Concise Dictionary*, 395 (1992). "Flee" means "to pass away quickly and suddenly; to disappear, vanish." *The Oxford English Dictionary*, 2d Ed. 1037 (1989).

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[3] *See* W.R. LaFave, *Search and Seizure*, "Police Observations of Other Suspicious Circumstances," Sec. 9.4(f), 176-187 (West 1996).

[4] When a person takes flight upon the mere sight of the police, it is reasonable for an officer to suspect that the fleeing person may be, *inter alia*, (1) an escapee from jail; (2) wanted on a warrant, (3) in possession of contraband, (i.e drugs, weapons, stolen goods, etc.); or (4) someone who has just committed another type of crime.

There is no question that in the instant case Respondent took flight upon merely seeing a fully uniformed police officer. A brief summary of the facts establishes that four police cars were driving behind one another in the area of 4035 West Van Buren Street in Chicago. (J.A.8) In the last car were two officers: Officer Timothy Nolan, who was wearing his uniform and badge and Officer Harvey. (J.A.4,8,9) Officer Nolan saw Respondent standing in front of 4035 West Van Buren. (J.A.7) Respondent looked in the uniformed officer's direction and immediately began to run away. (J.A.5,9) Officer Nolan gave chase and saw Respondent run southbound through a gangway, and then through an alley. (J.A.6,9) During this time, Nolan saw that Respondent was holding a white plastic bag under his arm. (J.A.7,9) The officers eventually cornered and stopped Respondent and, upon patting down the plastic bag, recovered a loaded .38 caliber handgun. (J.A.9,11)[5] Hence, from the perspective of Officers Nolan and Harvey, Respondent's *unprovoked* flight at the mere sight of the police did not reflect innocent conduct, but constituted an inherently suspicious reaction to their presence justifying a temporary investigatory stop under Fourth Amendment jurisprudence. The conduct of Officers Nolan and Harvey was unquestionably reasonable. Any other response, Petitioner maintains, would have constituted a dereliction in their duties as law enforcement officers.

Finally, in advocating this position, Petitioner asks this Court to adopt a bright-line rule. Significantly, bright-line rules are no stranger to Fourth Amendment jurispru-

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[5] In the instant case, the propriety of the search conducted subsequent to the *Terry* stop is not an issue before this Court.

dence.[6] While some may see tension between a bright-line rule when reasonable suspicion exits and this Court's reliance on the "totality of circumstances" in a given case, bright-line rules are to some degree implicit in the doctrine that reasonableness ultimately constitutes a legal question reviewed *de novo* by appellate courts. *Ornelas v. United States*, 517 U.S. 690, 699 (1996) In fact, the *de novo* standard of review compels an unequivocal answer to the issue before this Court. The unification of precedent, which is the primary purpose of *de novo* review, would be severely defeated if this Court fails to answer the question of whether flight upon the sight of a clearly identifiable officer, as a matter of law, justifies a *Terry* stop. In discussing the disadvantages of applying a deferential standard of review as opposed to *de novo* review in probable cause and reasonable suspicion cases, this Court stated:

> ". . . *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with

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[6] *See* e.g. *United States v. Ross*, 456 U.S. 798 (1982) (Given probable cause, every part and contents of a vehicle can be searched that are capable of concealing the object of that search.); *Wyoming v. Houghton*, 526 U.S. ___, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (Given probable cause to seize and search driver and his car, all the personal property belonging to a **passenger** can be searched as long as said property is capable of concealing the object of that search.); *California v. Hodari D.*, 499 U.S. 621 (1991) (Show of authority can never amount to a seizure where the subject does not yield.); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (Police officers can order the driver of a lawfully stopped vehicle to exit as a matter of course.); *Maryland v. Wilson*, 519 U.S. 408 (1997) (Police officers can order the passengers of a lawfully stopped car to exit as a matter of course.); and *Michigan v. Summers*, 452 U.S. 692 (1981) (For Fourth Amendment purposes, a search warrant to search for contraband founded on probable cause automatically carries with it the limited authority to detain the occupants of premises while a proper search is conducted).

> a defined "set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Ornelas*, 517 U.S. at 697.

Most law enforcement officers, at one point or another, encounter an individual who flees at the sight of the police. Officers should know beforehand whether such an abnormal reaction to their presence justifies a temporary stop. Moreover, due to its uncomplicated nature, the issue should not be subjected to varied results. The failure to answer the question, as a matter of law, only encourages *ad hoc* rulings in similar factual scenarios. Thus, in order to attain uniformity, the lower courts also need to know whether an individual's unprovoked flight from a clearly identifiable police officer, in and of itself, justifies a temporary investigatory stop under *Terry*. A Fourth Amendment analysis of the issue demonstrates that a person's flight from authorities is so innately suspicious that it has been historically viewed as proof of guilt giving rise to dire legal consequences under the early common law. In fact, the bright-line rule advocated by Petitioner would have been wholeheartedly accepted by the Framers of our Constitution. Furthermore, assuming, *arguendo*, an inquiry into the common law fails to establish the propriety of the seizure at hand, the Government's interest in fostering good police work and facilitating the detection and prevention of crime overwhelmingly outweighs the limited intrusion of a temporary investigatory stop.

(1).

A Bright-Line Rule Permitting Police Officers To Conduct A Temporary Investigatory Stop Of A Person Who Flees At The Mere Sight Of The Police Would Have Been Regarded As A Lawful Seizure Under The Common Law When The Fourth Amendment Was Framed.

The Illinois Supreme Court erroneously held that Respondent's unprovoked flight upon seeing the police can never alone justify a temporary investigatory stop. The decision of the Illinois Supreme Court is contrary to the common law upon which this Court's Fourth Amendment jurisprudence is based. A proper analysis of the issue establishes that Fourth Amendment jurisprudence unequivocally supports the bright-line rule that a person's unprovoked flight at the mere sight of a clearly identifiable police officer constitutes such a rare and unnatural reaction to the presence of the police that it, standing alone, justifies a temporary investigatory stop.

The propriety of any seizure or search rests on the fundamental principle of "reasonableness." The Fourth Amendment to the United States Constitution, as it applies to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; U.S. Const., amend XIV. In deciding whether a particular governmental action complies with the Fourth Amendment, this Court first inquires whether the action was regarded as a lawful search or seizure under the common law when the Amendment was framed. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *Wyoming v. Houghton*, 526 U.S. ___, ___, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408, 414 (1999); *Florida v. White*, ___ U.S. ___, 119 S.Ct. 1555, 1558, 143 L.Ed.2d 748, ___ (1999). Where that inquiry yields no answer, this Court then turns, in

the alternative, to a balancing test where it evaluates the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed to advance legitimate governmental interests. *Acton*, 515 U.S. at 652-653; *Houghton*, 119 S.Ct. at 1300; 143 L.Ed.2d at 414. Petitioner maintains that the issue of whether a person's unprovoked flight from a clearly identifiable police officer constitutes reasonable suspicion justifying a temporary investigative stop is decisively answered by the first inquiry.

Obviously, the temporary investigatory stop authorized by this Court in *Terry* did not exist at the time the Framers adopted the Fourth Amendment. In *Terry*, this Court carved out a limited exception to the Fourth Amendment probable cause requirement for seizures. 392 U.S. at 30. In doing so, this Court determined that, in order to foster good police work and facilitate crime prevention, it was necessary to provide law enforcement with an intermediate response. As this Court has stated:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow crime to occur or a criminal to escape. On the contrary, *Terry* recognized that it may be the essence of good police work to adopt an intermediate response." *Adams v. Williams*, 407 U.S. 143, 145 (1972).

Thus, pursuant to *Terry*, a police officer can briefly stop a suspicious individual in order to ascertain his identity or to maintain the *status quo* while obtaining additional information. 392 U.S. at 22.

The fact that there was no *Terry* doctrine at the time the Fourth Amendment was drafted in no way deters the resolution of the instant issue under the first inquiry. An examination of certain historical writings and early opinions of this Court proves that, under the common law, it would have been lawful to seize a person who takes flight to escape detection by the Government. In fact, under the common law, those who fled faced remarkably severe legal consequences for such behavior.

Contemporaneous with the adoption of the Fourth Amendment, a person's flight was considered inherently suspicious behavior constituting conclusive proof of guilt. As pointed out in *California v. Hodari D.*, 499 U.S. 621, 624 n1 (1991), the inherent suspicion attached to a person's flight dates back to biblical times: "The wicked flee where no man pursueth, but the innocent are as bold as a lion." Proverbs 28:1. Significantly, this common sense appraisal of human conduct developed into a legal presumption of guilt that was firmly embedded in the common law at the time the Framers adopted the Fourth Amendment. An 1868 historical writing reveals that the early common law adopted the maxim that "flight from justice was equivalent to confession of guilt: *Fatetur facinus qui judicium furit*." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 472 (1868); *see also* W.M. Best, *Law of Evidence*, 5th Ed. 582 (1870) ("Our ancestors, observing that guilty persons commonly fled justice, adopted the hasty conclusion that it was only the guilty who did so. . . .").

Additionally, the following comments found in Burrill's *Circumstantial Evidence* illustrate that, despite its extreme and inflexible character, the conclusive effect attached to flight rests on a common sense evaluation of human nature:

> "Perhaps no proposition is more easily deducible from the constitution of human nature and the structure of the human mind, or more constantly confirmed by observation of criminal conduct, and even of culpable conduct in daily life, than this,—that delinquency and

guilt naturally shun investigation and seek concealment. The most instinctive impulse which leads the perpetrator of a crime to destroy or otherwise get rid of evidence which would convict him of its commission, has already been alluded to. Where it becomes impossible to conceal a crime by expedients of this description, the criminal consults his safety by *concealing himself*; and where no facilities for such concealment are found, resorts to actual *flight*.

Concealment and flight, as observation constantly shows, are, in themselves, closely connected circumstances; the one aiding the other, and serving as a means of rendering it more effectual, in attaining the common end of both. The criminal flies from the scene of the crime, to reach a place of concealment, even if near at hand; and he often conceals himself temporarily, and sometimes, in one hiding-place after another, with view to further or final and effectual flight, beyond the reach of justice and the danger of pursuit." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII; 469 (1868) (emphasis in original)

In pointing out that there are situations where criminals have refused to flee, Burrill further noted:

"But cases like these are manifest exceptions to what may be called the general rule, course or habit of criminal conduct. If it be true that some criminals do not conceal themselves or fly, it is equally true that the vast *majority* do. It is sufficient to refer to daily observation and the police reports in the daily prints, for confirmation of this familiar fact.

* * *

In minor crimes, variation from this general rule or habit of criminal conduct is of still more rare occurrence. The incendiary, the burglar, robber and thief, uniformly fly, or at least attempt to fly from the scene of the crime to places of concealment. So natural is this course, and so constantly is it looked for and counted on, that any possible exception to it would

undoubtedly be set down as evidence of mental imbecility * * *

Concealment and flight may, in short, be considered as parts of that grand policy of *secrecy* which has already been described as the natural characteristic of all criminal action, from its earliest stages to its latest consummations." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 471-472 (1868) (emphasis in original)

William Blackstone's *Commentaries on the Laws of England* further supports the determination that in the 1700's, the common law attached a strong presumption of guilt to an individual's flight. In his *Commentaries*, Blackstone specifically noted:

"For *flight* also, on an accusation of treason, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury finds the flight, the party shall forfeit his goods or chattels: **for the very flight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by law.**" William Blackstone, 4 *Commentaries on the Laws of England*, 380 (1765-1769) (emphasis added).

The fact that a person, whether found guilty or acquitted of the underlying criminal offense, lost his goods or chattel proves that, at the time the Framers adopted the Fourth Amendment, the common law endeavored to attach very severe legal consequences to a person's flight. In fact, this *per se* forfeiture rule demonstrates that the common law from its earliest inception sought to discourage a person's flight from authorities by adopting a bright-line rule.

In light of the common law tradition to consider flight to be conclusive proof of guilt, as well as the common law's *per se* forfeiture rule aimed at discouraging flight from authorities, it is evident that at the time the Fourth Amendment was framed, a repugnance to flight was so

deeply embedded in the common law that those who fled faced harsh and sweeping legal consequences. In comparison, Petitioner's position appears mild but, nonetheless, in harmony with the early common law. If a person's flight constituted conclusive proof of guilt—that being proof beyond a reasonable doubt—it almost certainly would have met the lower standard of probable cause justifying a full blown arrest under the common law. Needless to say, there can be no question that, under the common law, flight from the police would unquestionably have given rise to the even lower standard of reasonable suspicion, justifying the less intrusive seizure of a temporary investigative stop. As a result, such a seizure would have been considered lawful action under the common law and readily accepted by the Framers of our Constitution.

However, as Burrill also discusses, as the common law evolved, the conclusive effect that was attached to flight was abandoned. In its place, the common law adopted a less severe position by providing that a person's flight established only a factual presumption of guilt. In discussing this evolution, Burrill stated:

> "So impressed was the old common law with considerations of this kind, that it laid down the rule, which passed into a maxim,—that flight from justice was equivalent to confession of guilt: *Fatetur facinus qui judicium furit*. But this maxim, (like some others,) was undoubtedly expressed in too general and sweeping terms. It was defective in not taking notice of, and proving for certain important *exceptions*, having as clear a ground of truth as the maxim itself. For, as we have seen that guilty persons do not, in *all* cases, conceal themselves or fly so it is equally true that persons sometimes do betake themselves to these expedients, who are not, in fact, guilty persons; or, in other words, that *all* who hide themselves or fly are not necessarily and invariably guilty.

> In the modern law of evidence, due attention has been given to these considerations and the exceptions established by them; and rare as they may in fact be, such prominence and weight are allowed to them, as to take from the circumstance of flight, in particular, the conclusive effect formerly attached to it, and to leave it merely its natural *presumptive* character, as an evidence of criminal agency." A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 469-473 (1868) (emphasis in original)

Importantly, a quartet of cases decided by this Court, within a 12-month period, reveal that the strong and inflexible legal presumption attached to flight by English common law was firmly interwoven into the fabric of American law. *See Hickory v. United States*, 160 U.S. 408, 422 (1896); (reversing a murder conviction because the instructions given to the jury concerning flight were "tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive, that it was the duty of the jury to act on it as an axiomatic truth"); *Alberty v. United States*, 162 U.S. 499, 510 (1896) (again faced with jury instructions that affixed a conclusive presumption of guilt to flight, this Court stated: "we think it was especially misleading of the court to charge the jury that, from the fact of absconding, they might infer the fact of guilt, and that flight, 'is silent admission by defendant that he is unwilling or unable to face the case against him'".); *Starr v. United States*, 164 U.S. 627, 631-632 (1897) (reversing a murder conviction because the instructions given to the jury were identical to those given in *Hickory* and *Alberty*) and *Allen v. United States*, 164 U.S. 492, 499 (1896) (re-affirming *Hickory* and *Alberty* but clarifying that in neither case "was it intimated that flight of the accused was not a circumstance proper to be laid before the jury. . . Indeed, the law is entirely well settled that flight of the accused is competent evidence against him as having the tendency to prove guilt.") Accordingly, this Court did not renounce the conclusive effect attached

to flight until almost thirty years after Burrill's critical writings and only to the extent that flight alone could not conclusively establish guilt beyond a reasonable doubt.[7]

Additionally, in *Hickory*, this Court, citing to the following historical textbooks, explicitly recognized that the conclusive presumption of guilt attached to flight in American criminal law dates back to English common law: Best, *Presumption*, 323; Burrill, *Circumstantial Evidence*, 473; and Wills, *Circumstantial Evidence*, 70. This Court specifically noted that under the common law:

> "'flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried a forfeiture of the party's goods, whether he was found guilty or acquitted; and the officer always, until the abolition of the practice of the statute, called upon the jury, after the verdict of acquittal, to state whether the party had fled on account of the charge.'" *Hickory*, 160 U.S. at 418, citing Wills, *Circumstantial Evidence*, 70, quoting Baron Gourney, *Regina v. Belany*.

Opponents of the bright-line rule, advocated by Petitioner, may be able to point to the hasty and inflexible nature of the conclusive presumption of guilt historically attached to flight; however, they cannot escape the one and only relevant conclusion to the present analysis: when the Fourth Amendment was framed, the common law viewed flight as conclusive proof of guilt and boldly adopted a *per se* forfeiture law in order to deter flight from authorities. Although the legal significance that the common law affixed to flight was harsh and has since been abandoned, the above-mentioned historical writings and opinions of

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[7] The abandonment of the common law tradition is probably due to the fact that an irrefutable presumption is at odds with the constitutional mandate that the Government bears the burden of establishing guilt beyond a reasonable doubt, based on evidence that proves every essential element of the offense charged. *See County Court v. Allen*, 442 U.S. 140 (1979).

this Court unmistakably show that, when the Fourth Amendment was framed, the common law would have regarded a person's unprovoked flight from the police as highly suspicious behavior evincing conclusive proof of guilt, or at the very least, strong presumptive proof of guilt that would have constituted probable cause justifying a full blown arrest. Also, in light of the *per se* forfeiture rule, the common law places no barriers to the adoption of a bright-line rule that is aimed at discouraging flight from the police. Hence, it takes no great leap in logic or reliance on speculation to conclude that the Framers would have accepted the notion that such an unprovoked flight from authorities meets the lower standard of reasonable suspicion permitting the less intrusive seizure of a temporary investigatory stop.

(2).

A Bright-Line Rule Permitting Police Officers To Conduct A *Terry* Stop Of A Person Who, Without Provocation, Flees At The Mere Sight Of The Police Strikes A Proper Balance Between A Citizen's Privacy Interests And The Government's Interest In Fostering Good Police Work And Facilitating Crime Prevention And Detection.

If an examination of the common law at the time the Fourth Amendment was framed fails to establish that a seizure was lawful, this Court turns, in the alternative, to a balancing test to evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it is needed for the advancement of legitimate governmental interests and, on the other, the degree to which it intrudes upon an individual's privacy. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995); *Wyoming v. Houghton*, 526 U.S. ___, ___, 119 S.Ct. 1297, 1300, 143 L.E.2d 408, 414 (1999). Assuming, *arguendo*, an inquiry into the common law fails

to establish the propriety of the seizure at hand, the traditional standards of reasonableness unquestionably support this Court's adoption of the bright-line rule advocated by Petitioner.[8] In fact, the Government's interest in fostering good police work and facilitating the prevention and detection of crime overwhelmingly outweighs the limited intrusion of a temporary investigatory stop.

In evaluating the reasonableness of any seizure or search, it is important to recognize that the "reasonableness" of a particular intrusion must be judged by an objective standard, namely, whether the facts available to the police officer at the moment of the search or seizure warrant a person of reasonable caution to believe that the action taken was appropriate. *Terry*, 392 U.S. at 21-22. Hence, the officer's conduct must be reasonable under the circumstances known to the officer at the time he initiated the stop. *Id.* at 22. Reasonable suspicion may emerge from seemingly innocent, noncriminal conduct. *Sokolow*, 490 U.S. at 9-10. The question for a court to answer is the degree of suspicion which attaches to the circumstances surrounding a defendant's action. *Id.* at 10. As a result, "the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment'. . ." *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985). Reasonable suspicion encompasses a "sort

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[8] Petitioner recognizes that this Court has traditionally favored a totality-of-the-facts analysis in determining the presence of reasonable suspicion. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (The validity of a stop is evaluated under "the totality of the circumstances—the whole picture."). However, this Court has never ruled out the possibility that one circumstance could have such an overriding significance that it could alone provide the requisite reasonable suspicion for a *Terry* stop, or said otherwise, that one piece of the puzzle can give away the whole picture.

of 'common sense conclusio[n] about human behavior' upon which 'practical people—including government officials—are entitled to rely,'" rather than "an 'inchoate and unparticularized suspicion or hunch' . . ." *T.L.O.*, 469 U.S. at 346, quoting *United States v. Cortez*, 449 U.S. at 418 and *Terry v. Ohio*, 392 U.S. at 27.

In the instant case, the Illinois Supreme Court explicitly rejected the bright-line rule that permits a police officer to conduct a *Terry* stop of an individual who flees, without provocation, at the mere sight of a clearly identifiable police officer. *People v. Wardlow*, (J.A. 27). However, the Illinois Supreme Court's decision, with all due respect, lacks insight into human behavior and unduly curtails the function of the intermediate response that this Court embraced in *Terry* by ignoring the limited nature and scope of a temporary investigatory stop.

Although the Illinois Supreme Court acknowledged that Respondent's flight from a clearly identifiable officer gives rise to an "inference of guilt," the court also held that such flight does not constitute reasonable suspicion for a temporary investigatory stop. (J.A. 27) Petitioner maintains that such reasoning is illogical. It is inexplicable how a person's flight could be considered proof of guilt in one instance, but deemed incapable of providing an officer with a "reasonable suspicion" that criminal activity may be afoot in another instance. Indeed, the court totally disregarded the legal significance that has been historically attached to flight. (*See* Petitioner's Arg. A.(1)) Unprovoked flight at the sight of the police is not only unusual, but innately suspicious behavior. In fact, it has been said that "[f]light invites pursuit and colors conduct which hitherto has appeared innocent." *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977). This statement is based both on common sense and a keen understanding of human behavior. Unlike any other noncriminal human reaction, an individual's flight from an officer provides a strong

indication that criminal activity may be afoot.[9] From the perspective of a trained police officer, applying a common sense conclusion about human behavior, an innocent person would certainly not flee at the mere sight of the police. Therefore, it is no surprise that, in the companion case to *Terry*, this Court also recognized that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea* and coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Sibron v. New York*, 392 U.S. 40, 66-67 (1968).[10]

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[9] Notably, in denying defendant's motion to quash arrest and suppress evidence, the trial court found that once a person flees after having looked at the direction of a police officer, "there is reason to think there's a problem, [and officers] have a right to make inquiry." (J.A. 15)

[10] Significantly, the *Sibron* opinion clarifies any confusion that may have been created by *Wong Sun v. United States*, 371 U.S. 471 (1963), with respect to this Court's recognition that a person's flight is evidence of a guilty state of mind. In *Wong Sun*, the petitioner, James Wah Toy, argued that his flight when the officers appeared at his door did not justify an inference of guilt sufficient to establish probable cause. The facts of *Wong Sun* show that narcotics agents, acting on an unverified tip concerning drugs, approached a building containing a laundry business and the home of Toy. 371 U.S. at 473-474. An agent knocked on the door and when Toy answered, the agent identified himself as a customer. Toy told the agent that his establishment was not open for business and started to close the door. As the agent began to identify himself as a law enforcement officer, Toy slammed the door and fled down the hallway through the laundry into his apartment where his wife and child were sleeping in the bedroom. *Id.* at 474.

Since the agent affirmatively misrepresented his mission and "never adequately dispelled the misimpression engendered by his own ruse," this Court viewed Toy's flight as ambiguous conduct that "signified a guilty knowledge no more clearly than it did a

(continued...)

Here, the officer did not rely on Respondent's unprovoked flight to make a full blown arrest, but simply to conduct a temporary investigatory stop in order to determine the cause of the suspicious flight.

Additionally, many federal and state courts have held that a person's unprovoked flight at the mere sight of the police is sufficient to justify a temporary investigatory stop. *See United States v. Jackson*, 741 F.2d 223, 224 (8th Cir. 1984) (flight alone is sufficient for a *Terry* stop); *United States v. Tookes*, 633 F.2d 712, 716 (5th Cir. 1980) (defendant's flight justified the officers' decision to chase him and ask further questions); *United States v. Pope*, 561 F.2d 663, 668-669 (6th Cir. 1977) (flight from a clearly identifiable police officer sufficient for a *Terry* stop); *Au Yi Lau v. United States Immigration and Naturalization Service*, 445 F.2d 217, 233 n.10 (D.C. Cir. 1971) (suggesting that flight has the capacity to provide

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[10] (...continued)

natural desire to repel an apparently unauthorized intrusion." *Id* at 482-483. Under these circumstances, this Court found that Toy's flight did not establish probable cause to arrest.

The fact that Toy's flight did not rise to the level of probable cause does not undermine Petitioner's position that a person's unprovoked flight from a clearly identifiable police officer satisfies the lesser standard of reasonable suspicion. First, it cannot be said that Toy fled from a clearly identifiable police officer since the narcotics agent affirmatively misrepresented his office and failed to adequately dispel any misimpression. Second, the stop of Toy took place in his living quarters where his wife and daughter slept. Thus, the seizure in *Wong Sun* was far more intrusive than the *Terry* stop of Respondent which took place on a public street. In fact, under the Fourth Amendment, law enforcement officials have greater latitude in exercising their duties in public places. *Florida v. White*, ___ U.S. ___, 119 S.Ct. 1555, 1559 (1999). Hence, the *Wong Sun* opinion does not thwart the bright-line rule advocated by Petitioner because it has no bearing on the issue at hand.

reasonable suspicion for a temporary investigatory stop); *Platt v. State*, 589 N.E.2d 222 (Ind. 1992) (hasty flight sufficient for a *Terry* stop); *Harris v. State*, 423 S.E.2d 723 (Ga. 1992) (flight from police sufficient reason to conduct a *Terry* stop); *State v. Anderson*, 454 N.W.2d 763 (Wis. 1990) (flight alone is sufficient to warrant a temporary investigative stop); *State v. Stinnett*, 760 P.2d 124 (Nev. 1988) (suggesting that unprovoked flight would justify an investigative stop); *City of St. Paul v. Vaughn*, 237 N.W.2d 365 (Minn. 1975) (recognizing that flight from the police will serve to furnish the basis for an investigative stop). ***But see*** *United States v. Quinn*, 83 F.3d 917, 921-922 (7th Cir. 1996) (recognizing that while flight is not necessarily enough standing alone for a *Terry* stop, it is a relevant and probative factor in establishing reasonable suspicion); *United States v. Bennett*, 514 A.2d 414, 416-417 (D.C. Court of Appeals, 1986) (although flight alone is insufficient, it may be considered among other factors in order to justify a *Terry* stop); *United States v. Embry*, 546 F.2d 552, 555-556 (3rd Cir. 1976) (flight one factor to consider in determining reasonable suspicion); *Britt v. State*, 673 So. 2d 934 (Fla. 1996) (noting that flight from the police is not alone enough to support a *Terry* stop); *People v. Holmes*, 619 N.E.2d 396 (N.Y. 1993) (flight not alone sufficient to justify police pursuit); *State v. Hicks*, 488 N.W.2d 359 (Neb. 1992) (flight not sufficient standing alone to justify a *Terry* stop); *People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985), cert. granted, 475 U.S. 1094, cert. vacated, 478 U.S. 1017 (flight alone not sufficient for a *Terry* stop).

In refusing to recognize the innately suspicious nature of a person's flight, some courts have unsoundly reasoned that flight is an ambiguous act and, therefore, is insufficient to justify an investigatory stop. *See People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985). However, such reasoning lacks common sense and an understanding of

police work. "[S]uspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity." *State v. Anderson*, 454 N.W.2d at 766. In addressing this very issue in *Anderson*, the Supreme Court of Wisconsin also stated:

> Flight at the sight of police is undeniably suspicious behavior. Although many explanations could be hypothesized as the reason for the flight, a reasonable officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, "[i]t would be poor police work indeed for an officer . . . to have failed to investigate further." 454 N.W.2d at 766, citing *Terry*, 392 U.S. at 23.

The Supreme Court of Wisconsin, therefore, held that sudden flight at the sight of the police officer, as a matter of law, justifies a temporary investigatory stop under the *Terry* doctrine.

Furthermore, as made evident by the factual scenario in *Terry*, the determination that a person's unprovoked flight from the police is ambiguous and susceptible to innocent interpretation does not defeat the position that such unusual conduct establishes reasonable suspicion, because reasonable suspicion may emerge from seemingly innocent, noncriminal conduct. *Sokolow*, 490 U.S. 17-18. In *Terry*, the factors that justified the defendant's limited seizure were that the defendant walked down the street, looked inside a store window several times and spoke to another person on the corner. Terry's conduct was susceptible to innocent explanations. Defendant Terry could have been an indecisive shopper, or a disgruntled customer looking for the person who sold him defective goods. He could have been a snoopy competitor sizing up his compe-

tition. He could have been a prospective buyer of the business and curious about its present success or failure. He could have been the store's lessor checking on the lessee. He could have been waiting to meet a friend after work. He could have been a jealous boyfriend or husband checking upon his girlfriend or wife. In fact, there are a myriad of innocent explanations for Terry's conduct. However, the focus in the Court's analysis was not to determine whether Terry had innocent intentions, but rather to assess the reasonableness of the officer's suspicions. As one court astutely noted, "[i]t must be rare indeed that an officer observes behavior consistent *only* with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2nd Cir. 1979) (emphasis in original). Moreover, this Court in *Terry* recognized the fact that the officer was a trained professional with a unique perspective and determined that it would have been "poor police work" if the officer had not conducted an investigation. 392 U.S. at 23.

Moreover, due to the limited scope of a *Terry* stop, the Government's interests in fostering good police work and facilitating the prevention and detection of crime overwhelmingly outweigh an individual's privacy interests. A temporary investigatory stop is based on the determination that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). This Court, therefore, recognized that it may be "the essence of good police work to adopt an intermediate response." *Id.* As a result, a police officer can briefly stop a suspicious individual in order to ascertain his identity or to maintain the *status quo* while obtaining additional information. *Id.* at 146. Therefore, police officers are entitled to conduct *Terry* stops "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity **may be** afoot." 392 U.S. at 30 (emphasis added). Respondent's unprovoked flight at the mere sight of the police constitutes such unusual conduct.

Certainly, the authority to conduct a temporary investigatory stop, after an unprovoked flight, does not give police officers "carte blanche to make arbitrary or capricious stops," nor does it alter what constitutes probable cause. *Platt*, 589 N.E.2d at 226. As pointed out by the Indiana Supreme Court, the temporary stop authorized by *Terry* is just that: temporary. It is not, without more, an arrest. The stop authorizes only a limited intrusion for the purpose of conducting an investigation of the individual's suspicious conduct. In other words, "[i]t is the right to temporarily freeze the situation in order to make investigative inquiry." *Anderson*, 454 N.W.2d at 768.

In holding to the contrary, the Illinois Supreme Court determined that:

> "[a]llowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while the police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer questions, neither is the person under any obligation to answer." *Wardlow*, J.A. 21, quoting, *State v. Hicks*, 488 N.W.2d 359, 364 (Neb. 1992).

However, this reasoning disregards the fact that ". . . Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places." *Florida v. White*, ___ U.S. ___, 119 S.Ct. at 1559. This Court has drawn a definite "distinction between warrantless seizure in an

open area and such seizure on private premises." *Id.* Under the Illinois Supreme Court's rationale, which fails to make this distinction, any warrantless seizure or search conducted on the street, absent exigent circumstances, would be unconstitutional. However, law enforcement officers are indeed given greater latitude in exercising their duties in public streets because a search or seizure on the street is less intrusive than one conducted in a private residence. Simply put, a person has greater privacy interests in his own home than on a public street.[11]

Moreover, the bright-line rule advocated by Petitioner does not alter the limited nature of a *Terry* stop. In *Berkemer v. McCarthy*, 468 U.S. 420 (1984), this Court discussed the narrow scope of a *Terry* stop, and stated that:

> "'[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" (citations omitted) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released." 468 U.S. at 439-440.

In fact, in the instant case, had the officers not found a weapon during the *Terry* patdown, Respondent would have been free to decide not to answer questions and to go on his way. Petitioner's bright-line rule speaks to the factors that trigger a *Terry* stop, not to the limited nature of the stop itself.

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[11] Even English common law recognized that ". . . in criminal causes, the public safety supersedes the private." Blackstone, 4 *Commentaries on the Laws of England* at 223.

Additionally, Petitioner's position comports with the requirement that an officer's "reasonable suspicion" be founded on a particularized and objective basis that criminal activity may be afoot. This Court has instructed that "reasonable suspicion" is a commonsense, nontechnical concept that deals with "the factual and practical considerations of everyday life in which reasonable and prudent men, not legal technicians act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). This Court has described the standard as "a particularized and objective basis" for suspecting that criminal activity may be afoot. 517 U.S. at 695. As pointed out by the Supreme Court of Wisconsin, a police officer's stop of an individual, who suddenly, and without provocation, flees at the mere sight of the police, does not represent an "inchoate and unparticularized hunch" condemned by the *Terry* Court:

> "Rather, it furnishes an affirmative answer to the question in *Terry*: whether a reasonably prudent person in the circumstances of the officer would be warranted in the belief that the action taken was appropriate.
>
> Accordingly, we hold that behavior which evinces in the mind of a reasonable officer an intent to flee from police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police. Such flight, although not illegal, gives rise to a reasonable suspicion that some sort of wrongful activity is afoot." *Anderson*, 454 N.W.2d at 768.

Thus, when an officer can point to objective evidence that an individual has taken flight in direct response to the known presence of the police, a temporary investigatory stop complies with the strictures found in *Terry*.[12]

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[12] Notably, criminal law scholar Wayne R. LaFave opines that a person's flight from the police is sufficient, standing alone, to

(continued...)

Significantly, Justices of this Court have recognized not only the innately suspicious nature of flight at the sight of the police, but also the right of a police officer to conduct a temporary investigatory stop under such circumstances. Although not asked to address the instant issue in *California v. Hodari D.*, 499 U.S. 621 (1991), this Court was faced with a remarkably similar factual scenario. In that case, Hodari and a group of other youths fled at the approach of an unmarked police car, occupied by two police officers. *Hodari D.*, 499 U.S. at 622-623. The officers were suspicious and gave chase. At the time, the officers were wearing jackets with "Police" embossed on their front. One of the officers left the car. *Id.* He did not follow Hodari directly but took a circuitous route that brought the two face to face on a parallel street. Hodari, however, was looking behind him as he ran and did not

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[12] (...continued)

justify a temporary investigatory stop. In that regard, LaFave states:

> "It has been held that 'behavior which evinces in the mind of a reasonable police officer an intent to flee is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police.' This is a correct conclusion if read literally, but should not be construed to cover instances in which the suspect, at best, merely manifested a desire 'to avoid contact with the police.' The Rule is not objectionable on the ground that the flight may not suggest a particular variety of criminal conduct, for 'nothing in the fourth amendment * * * requires that a police officer's suspicions relate to a particular criminal activity.'" W.R. LaFave, *Search and Seizure*, Sec. 9.4(f), 181-182 (West 1996) (citation omitted)

As pointed out earlier, the bright-line rule, advocated by Petitioner, does not encompass conduct aimed at merely avoiding the police, but rather, a person's unprovoked flight at the mere sight of a clearly identifiable police officer. Such conduct certainly is a form of concealment and manifests a clear intent to avoid law enforcement detection. As a result, Petitioner's position is not objectionable in LaFave's opinion. See, Petitioner's Argument I. A. (1).

turn to see the officer until the officer was almost upon him. *Id.* At that point, Hodari tossed away a small rock. The officer tackled him, and the police recovered the rock, which proved to be crack cocaine. *Id.*

In reviewing the legality of Hodari's seizure, this Court considered only the issue of whether Hodari, at the time he dropped the drugs, had been "seized" within the meaning of the Fourth Amendment. This Court determined that the chase did not constitute a seizure for Fourth Amendment purposes. *Id.* at 626. While not addressing the present issue, the majority of this Court, aptly noted:

> "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts common sense. See Proverbs 28:1 ("The wicked flee when no man pursueth")." 499 U.S. at 623-624 n.1.

In *Michigan v. Chesternut*, 486 U.S. 567 (1991), this Court also dealt with the issue of whether an officer's pursuit of an individual constituted a "seizure" implicating the Fourth Amendment protections. In that case, four officers riding in a marked police car were engaged in routine patrol duties. *Id.* at 569. As their squad car came to an intersection, one of the officers saw a car pull over to the curb. A man got out of the car and approached Chesternut, who was standing alone on the corner. When Chesternut saw the patrol car nearing the corner where he stood, he turned around and began to run. The patrol car followed Chesternut, quickly caught up with him and drove alongside him for a short distance. *Id.* As the squad car drove beside him, the officers saw Chesternut discard a number of packets he pulled from his right-hand pocket. One of the officers got out of the car and examined the packets and discovered they contained pills, which he believed contained codeine. *Id.* Meanwhile, Chesternut ran a few paces further, stopped, and was placed under arrest.

This Court determined that Chesternut was not unlawfully seized during the initial pursuit for Fourth Amendment purposes. Significantly, in a concurring opinion, joined by Justice Scalia, Justice Kennedy stated:

> "It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for **[Chesternut's] unprovoked flight gave the police ample cause to stop him**." 486 U.S. at 576. (emphasis added)

Both *Hodari D.* and *Chesternut* also reflect the balance that this Court has struck between the opposing interests of an individual's right to avoid contact with the police and the Government's interest in the prevention and detection of crime. Of course, in deciding that pursuit of a fleeing individual was not a "seizure" for Fourth Amendment purposes, this Court had to balance these competing interests. Significantly, this Court ruled in a manner to restrict the definition of "seizure" under the Fourth Amendment. In determining that the officers' pursuit of a fleeing youth was not a seizure, this Court in *Hodari D.* stated that "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged." *Hodari D.*, 499 U.S. at 627.[13] Thus, with respect to the issue at bar, giving police officers the right to conduct an investigatory stop in the instant scenario comports with the balance struck in *Hodari D.* and *Chesternut*.

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[13] In addition to placing the public and potential suspects at risk, the failure to encourage compliance with police orders places police officers in danger. The 1998 Unified Crime Report, submitted by the Federal Bureau of Investigation, disclosed that in 1997, 65 officers were killed in the line of duty. Significantly, 9 were slain while investigating suspicious persons or circumstances. Uniformed Crime Report, Sec. I, "Law Enforcement Officers Killed," p. 3.

As evidenced by the preceding discussion, both an inquiry into the common law at the time the Fourth Amendment was framed, as well as the traditional standards of reasonableness, support the bright-line rule advocated by Petitioner. Hence, Fourth Amendment jurisprudence fully supports the determination that a persons's unprovoked flight at the mere sight of a clearly identifiable police officer is sufficient, in and of itself, to justify a temporary investigatory stop under *Terry*. Under such an investigatory stop, an officer is given the opportunity to conduct a brief inquiry aimed at confirming or dispelling his suspicion. Notably, in such an inquiry an officer could gain further information that may raise his suspicion to the level of probable cause. However, it is equally true that the officer may learn that his suspicion was incorrect or even that the person who fled was in need of police assistance. *Terry* did not discourage street encounters between the police and citizens, but set forth certain boundaries to the intermediate response of a temporary investigatory stop. In the context of flight, such an intermediate response is a necessary law enforcement tool in community policing.

Turning to the facts of this case, Officer Nolan's testimony unquestionably proves that Respondent, without provocation, took flight in direct response to the presence of Chicago police officers. Officer Nolan testified that on September 9, 1995, around 12:00 in the afternoon, he and his partner were in a police car. Although the officer could not recall whether the car was a marked or unmarked police car, he was travelling in a caravan of four police cars. Even if all the cars were unmarked, they were still clearly identifiable.[14] Officer Nolan was in full uniform

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[14] In denying Respondent's motion to suppress, the trial court specifically noted that "[a]lmost anybody can identify a police car[,] marked or obviously unmarked just as obviously." (R. B13).

and was wearing his badge as the caravan of police cars drove near the area of 4035 West Van Buren. Officer Nolan stated that as his police car drove past that area, Respondent looked in the uniformed officer's direction and immediately ran away. Officer Nolan turned his police car southbound to follow Respondent. He saw Respondent run southbound through a gangway, and then through an alley. (R. A6)

Under these circumstances, it was reasonable for Officer Nolan to conclude, when he saw Respondent immediately run away at the mere sight of the police, that criminal activity may be afoot. Pursuant to *Terry*, Officer Nolan was entitled to stop Respondent and conduct a field interview. Said otherwise, police officers would be left no other alternative but to shrug their shoulders and stand by helplessly while crime occurs and a potential criminal escapes. Petitioner, therefore, respectfully asks this Honorable Court to reverse the decision of the Illinois Supreme Court.

B.

If A Person's Flight Alone Is Insufficient To Justify A *Terry* Stop, Then Flight In A High Crime Area Provides The Particularized Grounds Necessary To Support A Reasonable Suspicion That Criminal Activity May Be Afoot.

If this Court declines to embrace the bright-line rule advocated by Petitioner, the fact that Respondent's unprovoked flight from the police took place in a location where there was a high incidence of narcotics trafficking provides the particularized grounds necessary to support a reasonable suspicion. This Court has indicated that the assessment of the totality of circumstances or the "whole picture" contains two elements, each of which must be present before a stop is permissible. *United States v.*

Cortez, 449 U.S. 411, 418 (1981). First, the assessment must be based upon all the circumstances and second, the assessment of the totality of the circumstances "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* at 418. In other words, "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity." *Id.* at 417. In this regard, a trained police officer is given great latitude in assessing the "whole picture," including the consideration of "various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kind of lawbreakers." *Id.* at 418. This Court noted that "[f]rom these data, a trained officer draws inferences and makes deductions—inferences and deductions that might elude an untrained person." *Id.*

It is no secret that drug traffickers and other criminal agents (i.e. prostitution, illegal gambling rings, etc.) engage in a pattern of operation that often includes concentrating their illegal activities in certain designated areas. The identification of such areas is a critical tool in the execution of law enforcement duties. The lack of such intelligence not only cripples the fight against crime, but also places law enforcement officers in danger. Therefore, under Fourth Amendment jurisprudence, a geographic area's reputation for criminal activity is a highly relevant factor in determining the propriety of a seizure or search. As early as 1824, in assessing the existence of probable cause to seize a vessel, this Court noted that:

> "It has been very justly observed at the bar, that the Court is bound to take notice of public facts and geographical positions; and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be

> gathered from the public documents." *In re Apollon*, 22 U.S. 362, 374 (1824).[15]

Significantly, in *Carroll v. United States*, 267 U.S. 132 (1925), this Court relied on the above-quoted language found in *Apollon* to take judicial notice that:

> ". . . Grand Rapids is about 152 miles from Detroit and that Detroit and its neighborhood along the Detroit River, which is the International Boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior." 267 U.S. at 160.

Hence, this Court relied on the reputation of a geographic area, in addition to other factors, to find that there was probable cause to stop a driver, known to be a "bootlegger" and search the car which was found to illegally contain 68 bottles of liquor. *Also see Brinegar v. United States*, 338 U.S. 160, 167-170 (1949) (fact that the area was known to be one of the worst active centers for bootleggers was relevant to the probable cause determination).

Therefore, it is no surprise that upon the development of the law respecting *Terry* stops, this Court explicitly identified the characteristics of a geographic area as a relevant factor in determining the existence of reasonable suspicion. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), this Court was faced with the propriety of a

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[15] Although this Court recognized that a geographical area's reputation for criminal activity is an appropriate factor to consider in determining probable cause, this Court in *Apollon* found that the question of whether the vessel intended to engage in unlawful traffic "must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources." 22 U.S. at 374. Significantly, the record in the instant case contains uncontradicted evidence that the geographical area where Respondent took flight from the police was plagued with a high incidence of drug trafficking. *See infra* pp. 40-41.

Border Patrol's *Terry* stop of a car near the Mexican border. In that case, this Court explained:

> "Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. They may also consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support reasonable suspicion." 422 U.S. at 885 (citations omitted).

See also United States v. Sharpe, 470 U.S. 675, 682-683 (1985) (Court noting that defendants' flight and evasive actions coupled with the fact that their cars were travelling in an area near the coast known to be frequented by drug traffickers were relevant in establishing reasonable suspicion); *United States v. Lane*, 909 F.2d 895 (6th Cir. 1990) (reasonable suspicion existed where officers, pursuant to an unverified tip, entered a building known to be a location for drug trafficking and saw four men, who stood inside a building, run at the sight of the officers); *State v. Wade*, 390 So.2d 1309 (La. 1980) (defendant's evasive conduct and flight at the mere sight of the police in a high crime area provided the reasonable suspicion to justify a *Terry* stop). *But see State v. Hewston*, No. 59095. 1990 Ohio App. LEXIS 3192 (Ohio App. August 2, 1990) (per curiam) (fact that defendant, who was standing with two men on a street corner of a high drug area, fled at the sight of approaching officers did not constitute reasonable suspicion); *Smith v. United States*, 558 A.2d 312 (D.C. App. 1987) (defendant's attempt to leave hurriedly when officers suddenly appeared in an area that was plagued with high narcotics trafficking did not provide reasonable suspicion).

Notably, Professor Wayne R. LaFave recognizes that "the area in which the suspect is found is itself a highly relevant consideration." W.R. LaFave, *Search and Seizure*, "Police Observations of Other Suspicious Circumstances," Sec. 9.4(f), 189 (West 1996). LaFave explains that the character of the area may cast a different light upon certain conduct. *Id.* at 189. However, LaFave cautions that "[u]nspecific assertions that there is a crime problem in a particular area should be given little weight, at least compared to more particular indications that a certain type of criminal conduct of the kind specified is prevalent in that area." *Id.* at 189-190.

Significantly, LaFave's concerns about vague assertions of a high crime area are unfounded in the instant case because Officer Timothy Nolan's testimony provides overwhelming evidence that Respondent was encountered in an area that is afflicted with a high incidence of drug trafficking. In fact, Officer Nolan's testimony concerning the reputation of the geographic area, where Respondent stood just p[illegible] to taking flight, is uncontradicted and undisputed [illegible] thus provides the objective manifestation that Respondent fled from the police because he was engaged, or was about to engage, in criminal activity.[16]

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[16] In denying Respondent's motion to quash arrest and suppress evidence, the trial court stated that "[i]t is common knowledge [that the] police know of the area where drugs are sold. They do have knowledge where contraband, including weapons, are being carried." (J.A. 14) Notably, the Illinois Appellate Court erroneously determined that the record did not support the contention that Respondent was in a high crime location. (J.A. 32) However, the Illinois Supreme Court properly found that "Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area." (J.A. 20) *See Ornelas v. United States*, 517 U.S. at 699 (noting that in reviewing determinations of reasonable suspicion and probable cause, reviewing courts (continued...)

On September 9, 1995, Officer Nolan and seven other police officers were assigned to the Special Operations Section of the Chicago Police Department to investigate narcotics sales in the 11th District. (J.A. 4,7-8) With that specific purpose in mind, four police cars, containing eight officers, converged on the general vicinity of 4035 West Van Buren Street. (J.A. 8) Officer Nolan knew that this particular area of his police district was plagued with a high incidence of narcotics trafficking. In fact, the officers travelled together in a caravan of four police cars because they expected to confront a large number of people, including customers and lookouts. (J.A. 8) Officer Nolan, who was in full uniform, with his badge, patch and name tag visible, observed Respondent standing near the front of 4035 West Van Buren Street. (J.A. 4,7,9) Respondent then looked in the officers' direction, at which time he began to run away. (J.A. 5,9) Officer Nolan turned his car southbound and saw Respondent run through a gangway, and then through an alley. (J.A. 6) At this point, Officer Nolan noticed that Respondent was holding a white, plastic bag under his arm. (J.A. 9) Officer Nolan eventually cornered Respondent on the street in the vicinity of 4036 West Congress. (J.A. 9) Thus, looking at the totality of the circumstances or the "whole picture," the fact that Respondent fled at the mere sight of the police, in an area that was plagued with a high incidence of drug trafficking, established the necessary particularized suspicion to justify a temporary investigatory stop.

In determining that no reasonable suspicion existed, the Illinois Supreme Court noted that "the officers were not responding to any call or report of suspicious activity in the area." (J.A. 24) This assessment totally disregards the

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[16] (...continued)
should take care to give due weight to inferences drawn from those facts by judges and local law enforcement officers).

fact that the officers were assigned to a special operation aimed at investigating narcotics sales in the area where they encountered Respondent. In light of the fact that Officer Nolan and seven other officers of the Special Operations Section were specifically assigned to investigate the narcotics sales in the vicinity of 4035 West Van Buren, it is obvious that Officer Nolan's characterization of that area is based both on his personal experience and departmental intelligence.[17]

Additionally, the Illinois Supreme Court erroneously stated that Respondent "gave no outward indication of involvement in illicit activity." (J.A. 25) However, this assessment totally disregards the fact that Respondent, without provocation, fled at the mere sight of a clearly identifiable police officer. Respondent's unprovoked flight at the mere sight of the police is certainly an objective manifestation that he was involved in criminal activity. Hence, applying a common sense understanding about human behavior, it was reasonable for Officer Nolan and his partner to conclude, based on their experience and knowledge of the area in question and Respondent's aberrant reaction to the presence of the police, that Respondent sought to escape law enforcement detection because he was engaged, or was about to engage, in criminal activity.

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[17] Significantly, "'high crime areas' are absolutely not determined in an arbitrary and capricious manner, but are so defined based on verifiable quantitative and qualitative factors, as well as strong anecdotal evidence." *See Amicus Curiae* Brief of the National Association of Police Organizations, Police Benevolent and Protective Association of Illinois and Illinois Police Association, Argument II. B. 19-26. Indeed, law enforcement agencies' identification of high crime areas is based on verifiable and objective criteria, including statistical data and sophisticated mapping techniques.

Furthermore, the fact that Respondent was holding a bag under his arm provides further objective manifestation that he was engaged or was about to engage in illegal activity. The bag could have contained either narcotics or a weapon. Officer Nolan testified that, based on his experience in the investigation of drug trafficking areas, "it is common for there to be weapons in the vicinity." (J.A. 11) Importantly, the factual scenario in *United States v. Sharpe*, 470 U.S. at 682-683, provides a strong indication that this factor further supports the existence of reasonable suspicion in the instant case. In that case, Drug Enforcement Agents observed two vehicles traveling in tandem for twenty miles in an area near the coast known to be frequented by drug trafficking. 470 U.S. at 682-683. A DEA agent testified that pick-up trucks with camper shells were frequently used to transport large quantities of marijuana. One of the vehicles was a pick-up truck that appeared to be heavily loaded, and the windows of the truck were covered with bedsheets instead of curtains. Although the existence of reasonable suspicion was not an issue in *Sharpe*, this Court stated that these factors established a reasonable suspicion justifying a temporary investigatory stop. *Id.* The bag under Respondent's arm, like the heavy loaded truck in *Sharpe*, in conjunction with Respondent's unprovoked flight in a drug trafficking area, unquestionably establishes reasonable suspicion.

As the preceding discussion demonstrates, under Fourth Amendment jurisprudence, the inherently suspicious nature of a person's flight at the mere sight of the police, in conjunction with the person's presence in a high crime area, gives rise to reasonable suspicion justifying the limited intrusion of a temporary investigatory stop. Therefore, the Petitioner respectfully requests that this Honorable Court reverse the Illinois Supreme Court's decision.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STATE OF ILLINOIS,

Petitioner,

—v.—

SAM WARDLOW,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF ILLINOIS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ILLINOIS, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Illinois is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many Fourth Amendment cases. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. Composed of more than 10,000 attorneys and 28,000 affiliate members in 50 states, NACDL is recognized by the American Bar Association as an affiliate organization. It also has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

The facts are not disputed. Around 12:15 p.m. on September 9, 1995, Officer Timothy Nolan of the Chicago

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Police Department was in uniform and driving a police cruiser in the vicinity of 4035 Van Buren. Officer Nolan and his partner were in the last car of a four-car police "caravan" involving eight officers. The officers were assigned to investigate narcotics in the area. J.A. 3-7.

While driving, Officer Nolan noticed respondent, Sam Wardlow, standing in front of 4035 West Van Buren. According to Nolan, respondent was doing nothing illegal, nor acting suspiciously. Respondent looked in the officers' direction and then fled. The officers followed respondent in their cruiser and observed him run through a gangway and an alley. Respondent then ran right toward the cruiser and was detained. Officer Nolan frisked respondent. Inside a white opaque plastic bag carried by respondent, Nolan felt a hard object similar in shape to a revolver. Nolan opened the bag and discovered a loaded handgun. Respondent was then arrested. J.A. 4-6.

Respondent was charged with various weapon violations. The trial court denied respondent's suppression motion. Recognizing that an investigative stop requires specific and articulable facts of criminality, the trial court stated that "[t]he police in [respondent's] case had nothing." Nevertheless, the trial court noted that it "is common knowledge police do know of the area where drugs are being sold. They do have knowledge of general areas where contraband, including weapons, are being carried." Applying a totality of the circumstances test, the trial court concluded that respondent's flight justified a stop and frisk. J.A. 12-13. After a bench trial, respondent was convicted of unlawful use of a weapon by a felon.

The intermediate appellate court in Illinois reversed. The appellate court found "no support in the record" for the inference that respondent was in a high crime area. There was no evidence that the police were targeting the area where respondent was observed "because it was known to be

a location where drugs were sold." The "officers were simply driving by, on their way to some unidentified location, when they noticed [respondent] standing at 4035 West Van Buren." The court explained that the record "was simply too vague" to support the judgment that respondent was in a place of high narcotics activity, or that his flight "was related to his expectation of police focus on him." Accordingly, the court concluded that respondent's flight, by itself, did not furnish reasonable suspicion to justify an investigatory stop. J.A. 27-28.

The Illinois Supreme Court affirmed. The court first set aside the appellate court's determination that the record did not support the inference that respondent was observed in a high-crime area. According to the court, Officer Nolan's testimony "was sufficient to establish that the incident occurred in a high-crime area." Thus, the sole issue before it was whether respondent's "flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop." J.A. 18.

The court concluded that flight alone, even in a high-crime neighborhood, did not provide reasonable suspicion of criminality. Noting this Court's precedents establishing a person's right to avoid police contact, the court adopted the reasoning of other lower courts which had decided that flight from the police was a manner of exercising one's right to avoid a police encounter. J.A. 19. The court also found that the record here did not contain corroborating facts to justify detaining respondent in light of his flight. The police "were not responding to any call or report of suspicious activity in the area." Furthermore, respondent exhibited "no outward indication of involvement in illicit activity prior to the approach" of the police. Because the record revealed "the absence of circumstances corroborating the conclusion that [respondent] was involved in criminal activity, Officer Nolan's testimony reveals nothing more than a

hunch." Consequently, the court ruled that the stop and frisk of respondent was unconstitutional. J.A. 22-23.[2]

In this Court, petitioner argues that unprovoked flight from the police *alone* justifies an investigative stop. In the alternative, petitioner submits that, even if unprovoked flight by itself does not justify a stop, flight in a high-crime area does justify a detention. Pet. Br. 5.

SUMMARY OF ARGUMENT

Freedom of movement is an established right that dates back to the common law era. Under our Constitution, all persons possess an unqualified right to stand or move about on the streets free of arbitrary and discretionary police restraint. More specifically, this Court's Fourth Amendment cases have recognized that, absent reasonable suspicion of crime, a person has an affirmative right to avoid police contact, and the exercise of that right cannot be used to justify an investigative detention. The ruling below simply reaffirms this core Fourth Amendment liberty interest.

The right to avoid police contact does not turn on the manner in which one exercises that privilege. Recognizing that no member of this Court has ever questioned the right to avoid police encounters, petitioner proposes the following distinction: Conduct that merely avoids the police is constitutionally protected; flight from the police, however, is suspicious and justifies an immediate detention. Petitioner's distinction is unsound as a normative matter because there is no "police-approved" method of exercising the right to avoid

[2] The result below is quite narrow: The holding of the Illinois Supreme Court does not address whether flight, coupled with other furtive actions, constituted reasonable suspicion. Nor does it directly address whether flight can be a factor in deciding whether there are sufficient grounds for an investigative stop.

police contact. Nor will this distinction provide practical aid to police officers and judges who must decide whether a person is merely avoiding the police, or is instead exhibiting behavior that is "innately suspicious."

The effect of petitioner's *per se* rule that flight alone constitutes reasonable suspicion will mean that a person who wants to prevent a police encounter *ab initio* cannot immediately and unequivocally indicate his desire to avoid the police without being detained. Flight is just another method of avoiding the police. Although petitioner suggests that only the "guilty" flee the police there are, regrettably, other reasons why people in certain communities might try to avoid police encounters.

Petitioner's alternative *per se* rule that flight in a high-crime area justifies an immediate detention is no more convincing than its *per se* rule that flight alone is suspicious. This substitute *per se* rule conflicts with the totality of circumstances test that this Court employs for determining whether reasonable suspicion exists in a particular case. Finally, petitioner's alternative *per se* rule ignores this Court's disapproval of police decisions that calculate reasonable suspicion based upon the character of a neighborhood or the company a person keeps.

ARGUMENT

I. ABSENT OBJECTIVE EVIDENCE OF CRIMINALITY, INDIVIDUALS HAVE AN AFFIRMATIVE RIGHT TO AVOID THE POLICE, AND SUCH AVOIDANCE CANNOT BE USED TO JUSTIFY AN INVESTIGATIVE DETENTION

It is well established that individuals enjoy the rights of freedom of movement and personal security while on the streets. William Blackstone described the privilege this

way: "This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 134 (1783). Last Term, the Court invalidated a Chicago law which barred criminal street gang members from loitering with one another or with other persons in any public place. *Chicago v. Morales*, __ U.S. __, 119 S.Ct. 1849 (1999). A majority of the Court agreed that Chicago's ordinance was constitutionally flawed because it failed to provide police officers minimal guidelines for deciding whether a person was "loitering" under the statute.[3] The impact the Chicago ordinance had on the right of free movement prompted a plurality of the Court to note that:

> [The] "right to remove from one place to another according to inclination" [i]s "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a "part of our heritage," or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.[4]

Similarly, *Kolender v. Lawson*, 461 U.S. 352 (1983), concluded that a criminal statute was unconstitutionally

[3] *See Morales*, 119 S.Ct. at 1861-62.

[4] *Id.* at 1857-58 (plurality opinion)(citations and footnotes omitted); *cf. id.* at 1865 (Kennedy, J., concurring in part and concurring in the judgment)(noting that, as interpreted by the state court, "the Chicago ordinance would reach a broad range of innocent conduct").

vague when it required persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence upon the request of a police officer during an investigatory detention. The Court found that the law in *Kolender* "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." *Id.* at 358. Justice O'Connor explained that such a law "implicates consideration of the constitutional right to freedom of movement." *Id.*

This Court's Fourth Amendment jurisprudence also recognizes that pedestrians are guaranteed the right to move about the streets free of police interference. "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968). Chief Justice Warren's majority opinion in *Terry* noted the common law origins of this right:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry, 392 U.S. at 9, quoting *Union Pac.R.Co. v. Botsford*, 141 U.S. 250, 251 (1891).[5]

[5] Petitioner argues that "the Framers would have accepted the notion" that flight from officials "meets the lower standard of reasonable suspicion" to justify an investigative stop. Pet. Br. 21. Of course, when the Fourth Amendment was adopted, constables and sheriffs held no general power to detain suspicious persons. Constables and sheriffs could arrest or detain individuals only where positive law authorized the intrusion.

(continued...)

Prior to *Terry*, police could not seize an individual unless they possessed probable cause to arrest the person.[6] *Terry* created an exception to the traditional probable cause rule. It held that, where an officer reasonably believes that criminal conduct "may be afoot" and that a suspect "may be armed and presently dangerous," an officer may frisk the suspect for weapons. *Terry*, 392 U.S. at 31.[7] Although

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[5] (...continued)
See, e.g., Entick v. Carrington, 95 Eng.Rep. 807, 817 (K.B. 1765)(rejecting a messenger's claim that he was obliged by his office to seize a man's books and papers: "[I]f this was law it would be found in our books, but no such law has ever existed in this country . . . if he will tread upon his neighbor's ground, he must justify it by law"); Blackstone, *supra* (explaining that the power of locomotion "cannot ever be abridged at the mere discretion of magistrate, without the explicit permission of the laws"). Petitioner has identified no positive law extant in 1791 authorizing the seizure of an individual who ran from approaching constables or other officers.

Justice Scalia's reliance on the "night walker" statutes as historic precedent for the power to detain suspicious persons does not aid the state here. First, Justice Scalia's concurring opinion in *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993), was not joined by any other member of the Court. Second, Britain's "night walker" statutes had largely fallen "into disuse" long before our Constitution was adopted, *see* Sir James Fitzgerald Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 189 n.2 (1883); in this country, "[t]he nightwatch was only a stopgap measure," at best. *See* Douglas Greenberg, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK 1691-1776, at 158 (1974). Third, even the "night walker" statutes would not have justified the daylight detention of respondent in this case.

[6] *See Dunaway v. New York*, 442 U.S. 200, 207-09 (1979); *Florida v. Royer*, 460 U.S. 491, 498 (1983)(plurality opinion).

[7] The term "reasonable suspicion" was not used by the *Terry* majority. "[N]owhere in Chief Justice Warren's opinion will you find the words 'reasonable suspicion' that have come to exemplify the *Terry* standard. Instead, the opinion carefully employs and adapts the language of (continued...)

this expansion of police power -- the so-called *Terry* stop and frisk -- constituted a significant change in Fourth Amendment doctrine, Chief Justice Warren emphasized that the Court was not retreating from the constitutional norm that citizens were free to come and go as they pleased without official restraint or interference, unless objective evidence warranted a police intrusion. *Id.* at 21-22.[8]

Significantly, other members of the *Terry* Court stressed that the scope of the Fourth Amendment's protection for pedestrians was not limited to the concept of freedom from arbitrary restraint. The amendment also protected the right to avoid police contact *ab initio*. Justice Harlan explained that although a police officer (like every other citizen) is free to address questions to persons standing on the street, the pe-

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[7] (...continued)
Brinegar v. United States, [338 U.S. 160 (1949)], the classical statement of the probable cause standard, while recognizing that officers may conduct protective searches when possessed of a lesser quantum of information." Earl C. Dudley, Jr., "*Terry v. Ohio*, The Warren Court, and The Fourth Amendment: A Law Clerk's Perspective," 72 St. John's L.Rev. 891, 896 (1998)(footnotes omitted); 4 Wayne F. LaFave, SEARCH AND SEIZURE §9.5(a) at 251 (3d ed. 1996)(same). It was in later cases that the Court began using the term "reasonable suspicion" to describe the quantum of evidence needed to justify an investigative detention of a person. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-84 (1975); *Brown v. Texas*, 443 U.S. 47, 52-53 (1979).

[8] *Cf. Brinegar v. United States*, 338 U.S. 160, 177 (1949)("[T]he citizen who has given no good cause for believing he is engaged in [criminal] activity is entitled to proceed on his way without interference")(footnote omitted); *Carroll v. United States*, 267 U.S. 132, 154 (1925)("[T]hose lawfully within the country [are] entitled to use the public highways [and] have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise").

destrian is free to disregard the police inquiry and move on. *Id.* at 32-33 (Harlan, J., concurring)("the person addressed [by a police officer] has an equal right to ignore his interrogator and walk away"). Justice White also emphasized that a pedestrian is under no obligation to cooperate with the police. A person approached by the police has the right to avoid a police encounter *and* the right to leave the scene. *Id.* at 34 (White, J., concurring)("Absent special circumstances, the person approached [by an officer] may not be detained or frisked but may refuse to cooperate and go on his way").

Since *Terry*, this Court has repeatedly recognized, without dissent, that absent reasonable suspicion, the Fourth Amendment grants individuals an affirmative right to avoid police encounters and move on. Moreover, the choice to refuse police contact cannot be used as a bootstrap to justify an investigative stop. *Brown v. Texas*, 443 U.S. 47 (1979), a case not cited by petitioner, epitomizes this core Fourth Amendment norm particularly well.

In *Brown*, police officers physically detained Brown to determine his identity, after Brown refused the officers' request to identify himself. Brown and another man were observed walking in opposite directions from each other in an alley in an area known for high narcotics traffic. An officer testified that he and his partner believed the two men "had been together or were about to meet until the patrol car appeared." *Id.* at 48. The officers stopped Brown because "the situation 'looked suspicious and [they] had never seen [Brown] in that area before.'" *Id.* at 49. Brown refused to identify himself and angrily asserted that the police had no right to stop him. *Id.* A unanimous Court held that, because the officers lacked reasonable suspicion that Brown was involved in criminal conduct, detaining him to ascertain his identity violated the Fourth Amendment.

Similarly, in *Florida v. Royer*, 460 U.S. 491 (1983), no member of the Court expressed disagreement with Justice White's conclusion that a person approached by the police has a fundamental right to withhold his cooperation and "go on his way." Justice White explained:

> The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Id. at 497-98 (citations omitted).[9]

Finally, in *Florida v. Bostick*, 501 U.S. 429 (1991), Justice O'Connor reaffirmed the norm announced in *Brown* and *Royer* that citizens are under no obligation to tolerate police inquiries and retain the right to refuse cooperation with legitimate law enforcement practices. *Bostick* ruled that police questioning of a passenger on a bus does not automatically constitute a seizure under the Fourth Amendment. Although police questioning is permitted without rea-

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[9] *See also United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (opinion of Stewart, J., joined by Rehnquist, J.)(recognizing that no seizure occurs within the meaning of the Fourth Amendment "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away"); *cf. INS v. Delgado*, 466 U.S. 210, 216-17 (1984)(opinion of Rehnquist, J., for the majority)(While concluding that police questioning, by itself, does not implicate the Fourth Amendment, "if the person refuses to answer and the police take additional steps -- such as [detaining him] -- to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure").

sonable suspicion, Justice O'Connor was careful to point out that an individual cannot be penalized for refusing to cooperate with the police. "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.* at 437 (citations omitted).

In sum, *Terry* and its progeny permit investigative detentions of persons where reasonable suspicion of criminal behavior exists. However, the exception created for *Terry* stops was never meant to displace or challenge the core right of all persons to avoid police encounters where objective evidence of criminality is lacking to warrant an intrusion upon one's liberty and personal security. Indeed, since *Terry*, the Court has spoken with one voice and left no doubt that individuals have an affirmative right to avoid police contact and that the exercise of that right, by itself, cannot justify an investigative detention.

A. The Right To Avoid Police Contact Does Not Turn On The Manner In Which One Exercises That Privilege

Recognizing that no member of the Court has questioned an individual's right to avoid police contact, petitioner attempts to draw a distinction between conduct that "simply avoids the police," and a decision to "take flight," which petitioner argues justifies an investigative stop. Pet. Br. 9; *id.* at 31, n.12 (proposed *per se* rule "does not encompass conduct aimed at merely avoiding the police, but rather, a person's unprovoked flight" from the police). Adopting a slightly different tack, the United States, as *amicus curiae*, concedes that the suspicious aspect of respondent's conduct "was not running *per se*." Rather it "was the fact that respondent deviated dramatically from his prior course of conduct in response to the officers' arrival, and for the apparent purpose of avoiding police scrutiny." U.S. Br. 20, n.11.[10]

The distinctions drawn by petitioner and its *amici* cannot be reconciled with the mandates of the Court's cases. The statements coming from the Court could not be clearer: Unless reasonable suspicion exists, the Fourth Amendment provides individuals the affirmative right to avoid police contact. The positive right to avoid police officers articulated by the Court stands in sharp contrast to the Solicitor General's characterization of that right. According to the Solicitor General, *Royer*'s recognization of an individual's right to "go on his way" and its assertion that the exercise of that right cannot justify a detention, 460 U.S. at 498, "are best understood to refer to situations in which a person simply refuses to cease or modify his behavior in response to police entreaties." U.S. Br. 19. This is a superficial description of the constitutional privilege to avoid the police. The defendant in *Brown v. Texas* did not "simply refuse[] to cease or modify his behavior in response to police entreaties." Rather, Brown discernibly altered his conduct, and tried (unsuccessfully) to avoid police officers who were approaching him.[11]

This Court's cases have never suggested that the right to avoid police contact turns on the manner in which one exercises that privilege. Nor has the Court indicated that the choice to exercise the privilege can be second-guessed by

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[10] *See also* Brief of Ohio, *et al.* as *Amici Curiae* at 4 (arguing that "the freedom to move away from an inquiring officer is not directly implicated here. What this record presents is flight upon learning police are present in [a high crime] vicinity").

[11] *See* 443 U.S. at 48 ("Although [Brown and another man] were a few feet apart when they first were seen, Officer Venegas later testified that both officers believed the two had been together or were about to meet until the patrol car appeared").

police officers. For example, in *Brown v. Texas*, if Brown had moved more quickly and eluded the officers in the alley, a later detention of Brown after the police caught up with him would have also violated the Fourth Amendment. Or, in *Bostick*, if instead of listening to the officers' questions and agreeing to a consent search of his luggage, Bostick had abruptly left his seat and headed for the restroom, or hurriedly departed the bus, the officers still would have lacked reasonable suspicion for a detention.[12] This is because there is no "police-approved" method of exercising the right to "move on." Nor is there a constitutionally prescribed way to signal that one intends to "decline" all police inquiries and intends to "go on his way." *Royer*, 460 U.S. at 498. Where reasonable suspicion of criminality is lacking, "the balance between the public interest and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. at 52.

Moreover, the distinctions drawn by petitioner and its *amici* will not work. Under petitioner's analysis, police officers and judges would be forced to decide where on "a wide spectrum of conduct," Pet. Br. 9, a person's deportment falls to determine whether the person is exercising his or her unequivocal right to avoid the police, or is instead exhibiting behavior that is "innately suspicious." According to petitioner, cases where a person "turns around or walks away to avoid contact with the police" fall in the middle of the spectrum and do not justify *Terry* stops. Pet. Br. 9. By

[12] *Cf.* Brief for United States as *Amicus Curiae* Supporting Petitioner at 20, *Florida v. Bostick*, No. 89-1717 ("As an initial matter, the fact that [Bostick] could have moved from his seat showed that he was 'free to leave.' He could have told the officers that he did not want to talk to them and walked down the aisle or into the bathroom on the bus if he wished to distance himself from the officers").

contrast, flight falls on the opposite end of the spectrum yunder petitioner's proposed framework because it is "an innately suspicious reaction to the presence of the police." *Id.*

Petitioner purports to rest this artificial construct on "common sense." In fact, it neither conforms to this Court's cases nor to common police practices. Patrol officers interpret any form of avoidance or concern about the presence of the police as suspicious, including conduct that petitioner concedes cannot constitute reasonable suspicion.[13] Petitioner suggests that the constitutional definition of reasonable suspicion must be constructed from the "point of view of a police officer," Pet. Br. 8, but this approach obviously proves too much: Police officers are trained to be overly

[13] *See e.g.*, Michael K. Brown, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 175 (1988)("Flight from an approaching patrol car implies guilt; an innocent person, patrolmen reason, would have nothing to fear from the police and would not walk away . . . ."); Jerome H. Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 45 (2d ed. 1975)(quoting an article by a police expert discussing which persons to select for field interrogation: officers are told to detain, *inter alia*, persons "who attempt to avoid or evade the officer," persons who exhibit "[e]xaggerated unconcern over contact with the officer," and persons "visibly 'rattled' when near the policeman"); Jonathan Rubinstein, CITY POLICE 236 (1973)("Anyone who indicates an intention of flight at the appearance of a patrolman immediately comes under suspicion. Obviously, when a policeman turns a corner and suddenly someone begins running, he suspects them of fleeing from his presence. But even if he does not connect their flight with his appearance, he takes it as evidence that something is amiss in the area. Young boys are often stopped simply because the patrolman sees them running down the street, and often that is all they are doing"); Lawrence P. Tiffany, *et al.*, DETECTION OF CRIME 32 (1967)("A person who manifests concern for the presence of the police, who repeatedly glances at the officer, who changes his direction in an apparent attempt to avoid confronting the officer, or who flees at the sight of an officer will commonly be detained and questioned").

suspicious,[14] and often consider suspicious conduct that is constitutionally protected.[15]

More importantly, petitioner's *per se* rule would eventually overwhelm the right to avoid police contact. Petitioner insists that "flight" or "running away" from the police is innately suspicious. But what if, instead of "running away" from Officer Nolan's "caravan," respondent immediately jumped on his bicycle and pedaled away, or hurriedly entered a taxi waiting at a taxi-stand and told the driver to leave? Both movements could be considered "flight." Or, what if respondent, after noticing the police, immediately turned around and entered the building located at 4035 West Van Buren? To the typical officer, riding away on a bike, entering a car and driving off, or disappearing inside a building, in response to approaching officers is likely to be seen as the equivalent of "flight" or "running away," and thus, justify a seizure.[16] If these choices warrant a detention, then the right to avoid police has been reduced to a

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[14] *See* Skolnick, *supra* 45-48 (noting an officer "develops a perceptual shorthand to identify certain kinds of people as symbolic assailants," and that an officer's "conception of order emphasize[s] regularity and predictability").

[15] *See e.g.*, *Reid v. Georgia*, 448 U.S. 438, 441 (1980)(*per curiam*)(officer's belief that defendant and his companion were attempting to conceal the fact that they were traveling together is insufficient to justify seizure)(citation omitted); *Brown v. Texas*, 443 U.S. at 49 (officer's testimony that suspect looked suspicious and had never been seen before does not constitute reasonable suspicion); *Sibron v. New York*, 392 U.S. 40, 62 (1968)(although officer testified he approached and searched Sibron because he saw Sibron in the company of known narcotics addicts over an eight-hour period, "the inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security").

[16] *See supra* note 13.

privilege only to "walk away" from the police in an orderly manner. On the other hand, if petitioner's bright-line proposal does not cover these choices, then petitioner's rule provides no illumination for officers and judges who must decide whether certain conduct constitutes "flight" or is merely "avoidance" of the police. If petitioner's rule does not encompass such conduct, then officers, judges and citizens will be left guessing what forms of "flight" are constitutionally protected.

Under any scenario, petitioner's proposal should be rejected. The right to avoid police contact is an affirmative right. Its existence does not turn on the manner in which one exercises that privilege, nor does it require police approval that the decision to shun approaching officers seemed more like "avoidance" than "flight." The personal security guaranteed by the Fourth Amendment should not turn on such standardless judgments that are bound to yield unprincipled results and are too easily subject to abuse by the officer in the field. As Justice Kennedy noted in another context, "[l]iberty comes not from officials by grace but from the Constitution by right." *Maryland v. Wilson*, 519 U.S. 408, 424 (1997)(dissenting opinion). Put another way, a right that is sometimes not a right is no right at all.

B. Flight From The Police Cannot Justify A Detention; Otherwise, A Person's Right To Avoid Police Contact Is Meaningless

Brown v. Texas, *Royer* and *Bostick* recognize that, unless reasonable suspicion exists, all persons retain a fundamental right to refuse cooperation with the police, to avoid police questions, and to terminate police encounters. Petitioner, however, contends that "most citizens, regardless of their personal attitude toward the police, do not react by fleeing at the mere sight" of the police. Pet. Br. 8. In petition-

er's view, unprovoked flight is "aberrant behavior" that justifies an immediate detention. *Id.* Petitioner's *per se* rule would make the right to avoid police contact meaningless.

At its core, petitioner's proposal is a repudiation of the right to avoid police contact. One commentator has aptly explained why, if flight alone is grounds for a detention, the right to avoid police contact is illusory for someone who wants to prevent a police encounter from the beginning:

> [I]ndividuals have a right to avoid answering police questions where detention is not justified. Implicit in that right is the right to avoid being questioned in the first place. To require a person to wait for a police officer to approach before turning away would suspend the individual's right to go on his way from the time he became aware of the officer's approach [or presence] until some magic moment when the right reappeared.[17]

Several lower courts, including the court below, have ruled that allowing officers to forcibly detain a person because of flight "belies the proposition that citizens are free to ignore police." *Id.* at 223.[18] By holding that flight alone cannot justify a detention, the ruling below reaffirms what Justices Harlan and White stated explicitly in *Terry*, and what is implicit in *Brown v. Texas*, *Royer* and *Bostick*: Because there is no obligation to respond to police inquiries, it follows *a fortiori* that the otherwise nonsuspicious person who immediately and unequivocally indicates his desire to avoid the police cannot be detained.[19]

Petitioner seeks to avoid this logic by asserting that unprovoked flight from the police is "aberrant behavior" and is highly suspicious. Pet. Br. 8. This legal conclusion regarding the suspicious nature of flight is not based on any empirical data.[20] Instead, the foundation for petitioner's conclusion rests on the perspective of the police officer. "[F]rom the objective point of view of *any* reasonable police officer, applying a common sense conclusion about human behavior, [flight is] an abnormal reaction [that] is highly suspicious requiring an investigation." *Id.* (emphasis in original).

As an initial matter, petitioner's deduction regarding flight is curious. Because an officer's experience tells her that "most citizens . . . do not react by fleeing," *id.*, petitioner asserts that flight is "aberrant behavior" and thus suspicious. Using this logic, an officer might also find that a citizen's refusal to permit a consent search is suspicious. After all, the experience of many officers is that most citizens allow them to search their cars, luggage and other possessions.[21] Under petitioner's reasoning, the unusual person

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[17] Rachel A. Van Cleave, "*Michigan v. Chesternut* and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?," 40 Hastings L.J. 203, 216 (1988).

[18] *See, e.g., State v. Tucker*, 642 A.2d 401, 408 (N.J.Sup.Ct. 1994); *People v. Holmes*, 619 N.E.2d 396, 397 (N.Y.Ct.App. 1993); *State v. Hicks*, 488 N.W.2d 359, 363 (Neb.Sup.Ct. 1992); *People v. Shabaz*, 378 N.W.2d 451, 460 (Mich.Sup.Ct. 1985); *People v. Thomas*, 660 P.2d 1272, 1275 (Colo.Sup.Ct. 1983)(*en banc*); *Watkins v. State*, 420 A.2d 270, 274 (Md.Ct.App. 1980).

[19] It is undisputed, that prior to respondent's flight, there is no evidence that respondent had violated any law. J.A. 4.

[20] As the Solicitor General acknowledges, there are "no empirical studies regarding the frequency with which persons detained on the basis of flight are found to be involved in criminal activity." U.S. Br. 10, n.4.

[21] *See, e.g.*, Gary Webb, "Driving While Black," Esquire 118, 125 (April 1999)(noting in an investigation of "Operation Pipeline," a federal pro-

(continued...)

who refuses to allow a consent search, or who refuses to cooperate with a police request,[22] is exhibiting "aberrant behavior" and thus provides grounds for an investigative detention. This Court has never endorsed such logic.[23]

Furthermore, petitioner's categorical judgment regarding flight fails to consider other, unfortunately documented reasons an individual might have for avoiding the police.[24]

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[21] (...continued)
gram that trains police officers to identify drug couriers, that "nine out of ten people" agree to consent searches of their automobiles when asked by officers).

[22] *Cf. Delgado*, 466 U.S. at 216 ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response").

[23] In *Bostick*, the Solicitor General stated that no suspicious inferences may be drawn from a person's refusal to cooperate with police officers:

> Moreover, it is clear that law enforcement officers may draw *no* inference justifying a search or seizure from a refusal to cooperate. That is, officers lacking legal justification to detain a person may not bootstrap noncompliance into justification for a detention, because in that event a citizen would in effect have no way of declining to participate in a "consensual" encounter with the police.

Brief of the United States as *Amicus Curiae* Supporting Petitioner at 25, *Florida v. Bostick*, No. 89-1717. *See also* 3 Wayne F. LaFave, SEARCH AND SEIZURE §8.1 at 597, n.9 (refusal to consent to a search, by itself, cannot constitute reasonable suspicion justifying a *Terry* stop)(citing cases); Rachel Karen Laser, "Unreasonable Suspicion: Relying on Refusals to Support *Terry* Stops," 62 U.Chic.L.Rev. 1161, 1178 (1995) ("Th[e] 'right' to refuse [a consent search] is undermined, however, if the exercise of that right can be used against a person").

[24] *See, e.g.*, Editorial, "For Some Running Away Not Suspicious But Rational: Fleeing From A Police Officer Should Not Be The Sole Basis (continued...)

For example, petitioner's assertion that individuals who flee from the police are "innately suspicious" persons, Pet. Br. 9, wrongly accuses the innocent young men in Dayton, Ohio who ran from an anti-drug police unit because of fear.[25] Petitioner's conclusions about flight also mistakenly categorizes the person who flees at the sight of police because he

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[24] (...continued)
For A Search," Portland Press Herald (Maine), May 11, 1999 (noting that recent incidents of racial profiling by the police "show that some officers will react differently to people depending on their skin color or age. For someone who has had that experience, running away at the sight of police wouldn't be suspicious behavior, it would be sensible"); Richard W. Stevenson, "Los Angeles Chief Taunted at Hearing: U.S. Plans Wide Inquiry on Brutality," N.Y. Times, Mar. 15, 1991, at A16 (quoting California Assemblyman Curtis Tucker saying after the Rodney King beating: "When black people in Los Angeles see a police car approaching, 'They don't know whether justice will me meted out or whether judge, jury and executioner is pulling up behind them'").

Recently, the New Jersey Attorney General acknowledged that "minority motorists have been treated differently [by New Jersey State Troopers] than nonminority motorists during the course of traffic stops on the New Jersey Turnpike." According to the Attorney General, "the problem of disparate treatment is real -- not imagined." Interim Report of the [New Jersey] State Police Review Team Regarding Allegations of Racial Profiling 8 (1999). The Attorney General noted that such treatment "leaves persons of color with a sense of powerlessness, hostility, and anger." *Id.* at 41.

[25] The Wall Street Journal described the fear and anger in the black community of Dayton caused by the tactics of an anti-drug police task force. *See* Alex Kotlowitz, "Drug War's Emphasis On Law Enforcement Takes a Toll on Police," Wall Street Journal, Jan. 11, 1991, at A1 ("Black leaders complained that innocent people were picked up in the drug sweeps . . . . Some teenagers were so scared of the task force they ran even if they weren't selling drugs"). The Journal reported that one officer "once whacked a fleeing suspect across the forehead with an aluminum flashlight. Another time he shoved a drug suspect against the van, shattering a window. 'If [a suspect] ran and got caught, he took an ass-whipping'").

does not wish to drop his pants -- as many minority men in Boston were forced to do -- simply because the police suspect he belongs to a gang or is selling drugs.[26] After investigating charges that the Boston Police Department had repeatedly searched persons without cause, the Massachusetts Attorney General concluded:

> We conclude that Boston police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals in the Roxbury, Dorchester, and Mattapan communities . . . . We do not credit all of the allegations of all of the complainants. However, these allegations are widespread, common in nature, in some cases supported by witnesses, and consistent with other information we have received. Although we cannot say with precision how widespread this illegal conduct was, we believe that it was sufficiently common to justify changes in Department practices.[27]

Implicit in petitioner's *per se* rule is the notion that only the guilty would flee from the police. But concern

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[26] *See* Report of the Attorney General's Civil Rights Division On Boston Police Department Practices 36-46 (1990)(Mass. Report)(detailing allegations of illegal searches); *Commonwealth v. Phillips and Woody*, No. 080275-6, Memorandum and Order (Suffolk Sup.Ct. Sept 17, 1989)(ruling that a police directive that all known gang members and their associates would be searched on sight was "a proclamation of martial law in Roxbury for a narrow class of people, young blacks, suspected of membership in a gang or perceived by the police to be in the company of someone thought to be a member"); Peter S. Canellos, "Youths Decry Search Tactics," Boston Globe, Jan. 14, 1990, at 1 (describing how black youths were stopped, frisked, and strip searched by police without reasonable suspicion of crime).

[27] Mass. Report at 60.

with approaching officers is not "solely the lot of the guilty." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 465 (1990) (Stevens, J., dissenting). Indeed, at the time of respondent's arrest, residents of the Austin area on the West Side of Chicago were complaining about "crooked officers planting evidence on suspects, stealing money from drug dealers and behaving like gang members as they patrolled the streets."[28] Distrust and fear of the police were conspicuous:

> People hanging out on the streets and front stoops complain that police still harass, beat and sometimes arrest them for simply being in areas that are hot spots for drugs. "They are still doing the same stuff; if you don't got nothing, they still try to put something on you," complained Jimmy Ross, an ex-drug offender . . . . "They get mad because they don't catch you with nothing."[29]

Four Chicago police officers from the Austin District were eventually convicted in federal court on police corruption charges, and three other officers pleaded guilty to corruption charges.[30] One of the convicted officers, Edward "PacMan" Jackson, had a reputation among police and neighborhood residents for planting drugs on persons found on the street.[31]

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[28] Don Terry, "Worst Fears Are Realized With Officers' Arrest," N.Y. Times, Dec. 30, 1996.

[29] Jerry Thomas, "Trust Builds Slowly In Austin; Cops Yet To Repair Scandal's Damage," Chicago Tribune, Dec. 27, 1997.

[30] *See* Matt O'Connor, "4 Austin Officers Convicted, Face Stiff Prison Sentences," Chicago Tribune, May 22, 1998.

[31] *See, e.g.*, O'Connor, *supra* ("According to prosecutors, Jackson, 27, (continued...)

The point of this recitation is not that most police engage in such behavior. It is that these incidents of police misbehavior have been widely publicized in the affected communities, which more often than not are high crime areas, both through the media and by word-of-mouth. In light of these incidents and the perceptions they engender, the court below was correct to hold that respondent's flight by itself did not constitute reasonable suspicion.

Petitioner's claim that flight alone justifies an investigative stop cannot be reconciled with the right to avoid police contact. Like entering a waiting taxi and telling the driver to leave the scene, flight is simply another method of avoiding police contact. If, as this Court has already stated, criminality cannot be inferred from a person's submissiveness or failure to argue with an officer,[32] it certainly should not be inferred by one's willingness to exercise a constitutional right in the presence of the police.

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[31] (...continued)
was a renegade, out-of-control officer who robbed drug dealers, planted dope on others and did the bidding of gang bosses"); Andrew Martin & Bob Secter, *et al.*, "Lines Blur For Some Cops On Streets," Chicago Tribune, Dec. 22, 1996 ("[Officer] Jackson, police sources said, gained his nickname by allegedly planting packs of cocaine on Austin residents to frame them and extort money. 'If you didn't have a pack on you when he came, you'd have a pack on you when he left,' explained one source"); Terry, *supra* note 28 ("The investigation that brought about the officers' arrest was begun after months of complaints from the community. Officer Jackson, [one neighborhood activist] said, was known as PacMan, because people said he planted packs of drugs on suspects").

[32] *See United States v. Di Re*, 332 U.S. 581, 594-95 (1948)(Government argues that officers "could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station . . . . Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman").

C. A Ruling That Flight Alone Does Not Justify A Detention Still Permits Police Observation Or An "Investigatory Pursuit" Of One Who Flees

Petitioner contends that if flight does not constitute reasonable suspicion, then "police officers would be left no other alternative but to shrug their shoulders and stand by helplessly while crime occurs and a potential criminal escapes." Pet. Br. 36.[33] Of course, the ruling below will not require any officer to "stand by helplessly while crime occurs and a potential criminal escapes." An officer who observes a crime can make an immediate arrest. *See United States v. Watson*, 423 U.S. 411 (1976). Furthermore, this Court's Fourth Amendment rulings provide officers ample means to observe and question individuals who flee.

United States v. Knotts, 460 U.S. 276, 281 (1983), made clear that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts* held that police monitoring of an electronic beeper that was placed in a container of chemicals did not implicate the Fourth Amendment when it revealed no information that could not have been obtained through visual surveillance. *Knotts*' reasoning obviously extends to pedestrians. Hence, the Fourth Amendment was not violated when Officer Nolan observed respondent's movements on the street. *See id.* at 282.

More recently, in *California v. Hodari D.*, 499 U.S. 621 (1991), and *Michigan v. Chesternut*, 486 U.S. 567 (1988), the Court ruled that police pursuits of individuals do not

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[33] *See also* U.S. Br. 17 ("An immediate seizure is particularly appropriate in cases, like the present one, in which officers have no practical alternative means of further investigating the suspicious individual").

trigger Fourth Amendment safeguards unless certain circumstances occur. In *Chesternut*, a unanimous Court held that a police vehicle's "investigatory pursuit" of a man who ran from the police -- "a brief acceleration to catch up with [Chesternut], followed by a short drive alongside him" -- was not a seizure under the Fourth Amendment and, thus, did not require reasonable suspicion. *Id.* at 576. *Hodari D.* held that a police show of authority conveyed to a person fleeing from the police did not effectuate a seizure where the person did not yield. Because no seizure occurred in either case, officers could seize contraband abandoned by defendants who ran from the police, despite the absence of reasonable suspicion.

The rulings in *Hodari D.*, *Chesternut* and *Knotts* refute the claim that "the effect of flight is to foreclose the possibility that close observation of the individual will reveal additional signs of unlawful behavior." U.S. Br. 17. Police do not need reasonable suspicion to pursue or observe a person who flees when they approach. If the person abandons contraband while running, not only may the police seize the contraband, the evidence itself will provide, at a minimum, reasonable suspicion for a detention, or probable cause for arrest. If the person stops fleeing, officers may question him about his flight, *see Delgado*, 466 U.S. at 215-17; *Royer*, 460 U.S. at 497, provided their actions indicate to the reasonable person that he is "free to disregard the police presence and go about his business." *Chesternut*, 486 U.S. at 576.

II. FLIGHT IN A HIGH-CRIME AREA DOES NOT JUSTIFY A *PER SE* RULE THAT REASONABLE SUSPICION EXISTS

As an alternative argument, petitioner contends that, even if flight alone does not justify a stop, flight in a high-crime area justifies a detention. Pet. Br. 36. In effect, petitioner substitutes one *per se* rule for another *per se* rule. The court below, however, refused to adopt any *per se* rule to determine whether respondent's flight in a "high-crime" area constitutes reasonable suspicion. Following this Court's totality of the circumstances test for determining whether reasonable suspicion exists, the court below found respondent's seizure illegal because the police were unable to show specific, individualized facts that respondent was engaged in criminal activity. That narrow ruling is consistent with this Court's precedents.

Flight from the police in a "high-crime" neighborhood does not justify an automatic investigative detention. Petitioner correctly notes that this Court's Fourth Amendment cases have stated that the character of a geographic area may be considered when deciding whether probable cause or reasonable suspicion exists in a particular case. Pet. Br. 37-39. But petitioner is not proposing a rule where the character of a neighborhood is a relevant factor in determining reasonable suspicion. Rather, under petitioner's rule, the character of the area becomes the decisive factor in the reasonable suspicion inquiry. Petitioner's alternative *per se* rule conflicts with the established pattern of this Court's cases, which is to consider "the totality of the circumstances -- the whole picture," *United States v. Cortez*, 449 U.S. 411, 417 (1981), for determining whether reasonable suspicion exists in a particular case. *See also United States v. Sokolow*, 490 U.S. 1, 8 (1989).

Moreover, petitioner's alternative *per se* rule ignores this Court's disapproval of police decisions that calculate reasonable suspicion by relying upon the character of a neighborhood or the company a person keeps. *Sibron v. New York*, 392 U.S. 40, is especially instructive. There, an officer testified that he had observed Sibron continually for eight hours and saw Sibron converse with six or eight known narcotics addicts. Later, the officer confronted

Sibron outside a restaurant, put his hands in Sibron's pocket, and discovered narcotics inside. The officer's investigative search was ruled illegal. The Court explained: "The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." *Id.* at 62. If it is unreasonable for the police to infer that a person who associates and speaks with narcotic addicts is engaged in criminal behavior, it is equally unreasonable to infer that a person's mere presence in a "high-crime" area is a decisive factor when considering whether reasonable suspicion exists.

Similarly, in *Ybarra v. Illinois*, 444 U.S. 85 (1979), officers held a warrant to search a tavern and its bartender for narcotics. Ybarra was a patron of the tavern when the warrant was executed. All of the patrons were frisked as a safety measure, and narcotics were found on Ybarra. This Court invalidated the search of Ybarra. Justice Stewart explained that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91. Justice Stewart also rejected the claim that the frisk of Ybarra was proper under *Terry* due to his location on "'compact' premises subject to a search warrant." *Id.* at 94. Relying on the "governing principle" of *United States v. Di Re*, 332 U.S. 581, 586 (1948), Justice Stewart concluded that a person does not lose Fourth Amendment protection merely because he is found in the presence of others suspected of crime. *Ybarra*, 444 U.S. at 94-96.[34]

[34] *See also Brown v. Texas*, 443 U.S. at 52 ("The fact that [Brown] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [Brown] himself was engaged in criminal conduct").

This Court's cases teach that respondent's presence in a "high-crime" area cannot be the decisive factor for detaining him after he ran from the police. "Guilt-by-association" or "guilt-by-vicinity" has never been a legitimate method for proving reasonable suspicion. Instead, an officer must be able "to point to specific and articulable facts" that suggest criminality.[35] The ruling below reaffirms this principle.

[35] Apart from the lack of specific facts to justify a stop of respondent, there are *no* individualized facts that support frisking respondent. Officer Nolan testified that respondent was stopped in an area of "high narcotics traffic," and that in his experience weapons were in the vicinity. J.A. 7, 9-10. An officer's "common knowledge" that weapons may be in the area, or belief that persons who traffic in illegal narcotics carry weapons, do not support a frisk. To justify a frisk, an officer must have an *individualized* suspicion "directed at the persons to be frisked." *Ybarra*, 444 U.S. at 94; *see also Terry*, 392 U.S. at 21, n.18 ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence"). *Cf. Richards v. Wisconsin*, 520 U.S. 385, 393 (1997)(Rejecting a blanket rule permitting a no-knock entry whenever police execute a felony-drug search warrant. "The fact that felony drug investigations may frequently present circumstances warranting a no-knock entry" does not eliminate requirement that a judge find individualized facts indicating a reasonable suspicion that knocking and announcing police presence, under the particular circumstances, would be dangerous or futile, or allow the destruction of evidence); *Maryland v. Buie*, 494 U.S. 325 (1990)(rejecting state's *per se* rule that a protective sweep is valid *whenever* police arrest violent felon in a home; protective sweep is permissible only when there is reasonable suspicion based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene).

CONCLUSION

For the reasons stated above, the judgment of the Illinois Supreme Court should be affirmed.

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Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM WARDLOW, aka SAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

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ARGUMENT

A.

Respondent's Unprovoked Flight From A Clearly Identifiable Police Officer Was Sufficient, Standing Alone, To Warrant A Temporary Investigatory Stop Under The Fourth Amendment.

1. Petitioner's Position Does Not Advocate The Elimination Of The Totality Of The Circumstances Test.

Contrary to Respondent's bold assertion that the totality of the circumstances test will be eliminated if Petitioner's position is adopted, this Court has never ruled out the possibility that one circumstance can have such an overriding significance that it alone can provide the requisite suspicion for a *Terry* stop or, said otherwise, that one piece of the puzzle can give away the whole picture. (Pet. Br. 22, n.8) Indeed, this Court has never quantified the number of facts that must be present in order to reach the plateau of "reasonable suspicion."[1] Hence, reasonable suspicion can be established by the presence of ten, five or even one factor. The determining point is not the number of factors but the **degree of suspicion** that each factor provides. Among the wide spectrum of reactions an individual can have to the presence of the police, unprovoked flight possesses the highest degree of suspicion. It is one of those rare and revealing acts that, standing alone, provides reasonable suspicion. Thus, Respondent's claim that Petitioner seeks the reversal of the totality of the circumstances test is inaccurate. The reality is that the singular factor of unprovoked flight from a clearly identifiable police officer provides the requisite "circumstances" to amount to reasonable suspicion.

2. Petitioner's Position Does Not Eliminate Judicial Review.

In responding to Petitioner's brief, Respondent makes a confusing argument concerning judicial review. At points in his brief, Respondent appears to argue that Petitioner's position violates the Warrant

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[1] In essence, Respondent himself advocates a bright-line rule by urging this Court to ignore the degree of suspicion attached to unprovoked flight and hold that one single factor can never give rise to "reasonable suspicion."

Clause of the Fourth Amendment. At other points, Respondent appears to argue that a finding of reasonable suspicion on the basis of a person's unprovoked flight at the mere sight of a clearly identifiable police officer eliminates judicial review of the issue when raised in a motion to suppress. Respondent's arguments, however, were already addressed in the seminal case of *Terry v. Ohio*, 392 U.S. 1 (1968), and are at this juncture non-issues. Moreover, Respondent's essential concern, that the adoption of the proposed bright-line rule would obviate judicial scrutiny of police behavior, is simply untrue.

With respect to his Warrant Clause argument, Respondent claims that "Petitioner's request for a *per se* rule that flight from police always constitutes reasonable suspicion for a *Terry* stop is a less than subtle request to diminish the power of the judiciary to 'police the police.' " (Res. Br. 8)[2] Respondent further argues that "[t]he scheme of the Fourth Amendment becomes meaningful only when those engaged in the competitive enterprise of ferreting out crime are subjected to the detached, neutral scrutiny of a judge who examines particularized observations, taking into account the totality of circumstances." (Res. Br. 8) In support of his position, Respondent quotes from the dissent in *United States v. Rabinowitz*, for the proposition that "a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." 399 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

However, *Terry* confronted and rejected this same Warrant Clause argument. The *Terry* Court found that the Warrant Clause was not applicable to "stop and frisk" situations, stating that:

> "But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case

[2] Initially, it is important to point out that this statement fails to accurately present Petitioner's position: a person's **unprovoked** flight at the mere sight of a **clearly identifiable police officer** gives rise to a reasonable suspicion justifying a temporary investigatory stop.

> must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry*, 392 U.S. at 20.

Thus, the Warrant Clause of the Fourth Amendment is immaterial to the analysis of a temporary investigatory stop. This does not mean, however, that a *Terry* situation is not subject to judicial scrutiny. As the *Terry* Court stated:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in the light of the particular circumstances." *Terry*, 392 U.S. at 21.

Because of the nature of the "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat," the judicial scrutiny must take place after the investigatory stop.

Despite the adoption of the bright-line rule advocated by Petitioner, the right to file a motion to quash arrest and suppress evidence is not lost. In a suppression hearing, a trial court necessarily will have to examine the facts surrounding the seizure to determine (1) whether the individual took flight from the police; (2) whether the police were clearly identifiable; (3) whether the individual's flight was in direct response to the presence of the police; (4) whether the individual's flight was unprovoked; and (5) whether there were other circumstances that provided an innocent basis for the individual's flight. The procedural history of this case reveals that Respondent enjoyed such judicial review. Therefore, there is absolutely no merit to the contention that Petitioner's bright-line rule would eliminate judicial review.

3. A Bright-Line Rule Permitting Police Officers To Conduct A Temporary Investigatory Stop Of A Person Who Flees At The Mere Sight Of The Police Would Have Been Regarded As A Lawful Seizure Under The Common Law When The Fourth Amendment Was Framed.

Petitioner's opening brief firmly establishes that a bright-line rule permitting police officers to conduct a temporary investigatory stop

of a person who flees at the mere sight of the police would have been regarded as a lawful seizure under the common law when the Fourth Amendment was framed.[3] Specifically, Petitioner established that the early common law adopted the maxim that flight from justice was equivalent to confession of guilt. A.M. Burrill, *Circumstantial Evidence*, Ch. 1, Part II, Section XXII, 472 (1868); W.M. Best, *Law of Evidence*, 5th Ed 582 (1870). Relying on William Blackstone's *Commentaries on the Laws of England*, Petitioner also demonstrated that at the time the Framers adopted the Fourth Amendment, the common law attached very severe legal consequences to a person's flight by applying a *per se* forfeiture rule. Under this *per se* forfeiture rule, a person, on an accusation of treason, felony or even petit larceny, lost his goods or chattels if a jury made a finding of flight. William Blackstone, 4 *Commentaries on the Laws of England* 380 (1765-1769).[4] Significantly, this forfeiture rule applied whether the person was found guilty or acquitted of the underlying offense. *Id.* Since the common law boldly employed a *per se* forfeiture law to deter flight from authorities, it places no barriers to the adoption of a bright-line rule that is also aimed at discouraging flight from the police. Thus, the strong and inflexible legal presumption attached to

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[3] Significantly, the "night walker" statutes provide historic precedent for the power to detain suspicious persons under English common law. *See Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring). These statutes support the concept of a *Terry* stop based on reasonable suspicion and do not support an absolute right to movement, as under English common law or the laws of this country, "every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself." 2 W. Hawkins, Pleas of the Crown, ch. 13, § 6, 129 (8th ed. 1824); 1 E. East, Pleas of the Crown, ch. 5, § 70, 303 (1803); *see also Mayo v. Wilson*, 1 N.H. 53 (1817); *Lawrence v. Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (1810); *Roberts v. Missouri*, 14 Mo. 138, 145 (1851).

[4] Respondent's characterization of Petitioner's reliance on these writings as "lawyer's histories" or "Nineteenth Century Literature" fails to rebut the substantive content of these writings. Moreover, contrary to Respondent's casual dismissal of Blackstone's work as "lawyer's histories," this Court acknowledged that Blackstone's work "constituted the preeminent authority on English Law for the founding generation. . ." *Alden v. Maine*, 119 S. Ct. 2240, 2248 (1999); *see also Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (noting Blackstone was also a primary legal authority for 18th and 19th century American lawyers).

flight was firmly interwoven into the fabric of American law. *See Hickory v. United States*, 160 U.S. 408, 422 (1896); *Alberty v. United States*, 162 U.S. 499, 510 (1896); *Starr v. United States*, 164 U.S. 627, 631-632 (1897); *Allen v. United States*, 164 U.S. 492, 499 (1896).

Respondent, however, endeavors to escape the inevitable conclusion that under the common law it would have been lawful to seize a person who took flight to escape detection by the Government. Respondent attempts to establish a distinction between a person's flight prior to accusation and a person's flight after a charge has been brought against that individual. (Res. Br. 12, 15-17) Respondent asserts that the historical writings and the opinions cited by Petitioner deal with flight after accusation. He reasons that the common law, therefore, does not support the conclusion that flight from authorities, prior to accusation, would have been presumptive of guilt. *Id.* at 16. Initially, it is important to point out that Respondent's characterization of Petitioner's referenced historical writings is incorrect. A thorough reading of Blackstone's Commentaries does not establish that the forfeiture rule encompassed only flight after accusation. Likewise, Burrill's writings made no distinction between a person's flight before being charged and a person's flight after accusation. To the contrary, Burrill's writings dealt with the legal presumption of guilt attached to an individual's flight from "the scene of the crime." (Pet. Br. 16)

Respondent relies upon Wigmore to support his position that the common law drew a distinction between flight before and after accusation. Respondent sets forth the following quote from 2 John H. Wigmore, *Evidence*, Sec. 276 at 122:

> "It is universally conceded today that the fact of an accused['s] flight . . . is admissible as evidence of consciousness of guilt, and thus guilt itself." (Res. Br. 14, n. 9)

Respondent then infers from this quotation that "[t]he inferences to be drawn from the flight after accusation bear no relationship to the inferences to be drawn from the flight of an individual prior to accusation." (Res. Br. 14, n.9) A thorough reading of Wigmore's writings on the subject, however, fails to support Respondent's distinction between flight before or after accusation. After an extensive discussion on the topic that "[f]light from justice and its analogous

conduct, have always been deemed indicative of consciousness of guilt,"[5] Wigmore points out that:

> "It is occasionally required that the accused should have been aware that he was charged or suspected. This is unnecessary; **it is the act of departure that is itself evidential**; ignorance of the charge is merely a circumstance that tends to explain away the guilty significance of the conduct." 2 John H. Wigmore, *Evidence*, Sec. 276 at 129 (emphasis added).

Thus, Respondent's own authority belies his claim that the common law drew a distinction between flight before or after accusation.

Respondent correctly points out that the quartet of cases decided by this Court, upon which Petitioner relies, revolves around flight after accusation. This fact, however, does not defeat Petitioner's position that these cases demonstrate that a conclusive presumption of guilt was adopted by early American law. This Court has never adopted the absurd and illogical notion that flight before a charge does not give rise to an inference of a consciousness of guilt. To the contrary, in the companion case to *Terry*, this Court recognized that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea* and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Sibron v. New York*, 392 U.S. 40, 66-67 (1968). Significantly, this holding was made in the context of a defendant's flight prior to accusation. 392 U.S. at 66-67. Therefore, this Court should reject Respondent's baseless distinction between flight before or after accusation.

The only other attack that Respondent poses against Petitioner's common law argument is that Petitioner ignores several exhaustive

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[5] Respondent criticizes Petitioner for quoting the Bible and relying on the common law forfeiture rule in establishing the strong presumption of guilt historically attached to flight. (Res. Br. 5, 13, 16) However, Wigmore's writings, Respondent's own authority, also begin the historical analysis of the presumption of guilt attached to flight with the Biblical quote that "The wicked flee, even when no man pursueth; but the righteous are bold as a lion" and a discussion concerning the common law forfeiture rule. Wigmore, Sec. 276 at 129.

historical analyses of the Fourth Amendment. However, Respondent fails to identify *any* historical analysis that refutes the writings of Burrill, Blackstone or Best on the conclusive presumption of guilt attached to flight under the common law. Respondent identifies William J. Cuddihy's 1800-page unpublished Ph.D. dissertation, The Fourth Amendment: Origins and Original Meaning, as the most comprehensive history of the amendment ever written. (Res. Br. 12, n.7) However, Cuddihy's writings primarily dealt with the Warrant Clause of the Fourth Amendment[6] and did not analyze the legal presumption attached to flight under the common law. Perhaps most notable about Respondent's reliance upon this unpublished document is that Cuddihy himself asserts that the Fourth Amendment is simply too complex for legal analysis. (Res. Br. 12, n.7) Petitioner is at a loss to understand how Cuddihy's authoritative concession regarding the complexity of the Fourth Amendment undermines Petitioner's straightforward, commonsensical recognition that flight is inherently suspicious behavior evincing a consciousness of guilt and has been so deemed since the beginning of common law.

4. Respondent's Novel Claim Of A Constitutional Right To Flight Is Contrary To The Fourth Amendment.

Respondent's claim that he possesses a constitutional right to avoid police contact based on an undefined right of movement should be seen, and rejected, for what it is: a right to flight. Respondent shrouds himself in a panoply of descriptive terms including the "fundamental right[7] to withhold cooperation and 'go on his

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[6] Notably, in his analysis of the Fourth Amendment, Cuddihy concluded that the amendment contains two separate clauses: the Warrant Clause and the Reasonableness Clause. Cuddihy, *supra*, at 1545. Hence, his analysis supports this Court's determination in *Terry* that the Warrant Clause was inapplicable to the question of whether a temporary investigatory stop on the basis of reasonable suspicion comports with the Fourth Amendment.

[7] Respondent and Amicus ACLU both cite to the plurality opinion in *Florida v. Royer*, 460 U.S. 491 (1983), as recognizing this "fundamental right." The *Royer* plurality, however, never expressed, let alone discussed, whether any such right existed and certainly did not state that a fundamental right was present.

way.' "[8] This scattergun approach ignores that a "careful description" of the proposed constitutional right is necessary in order to assess the existence and application of that right. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Respondent, however, has been unable to identify, define, or even consistently label this multifarious right that could apply to all movement regardless of Respondent's intent or presence of the police. This Court should reject Respondent's amorphous description of this alleged right and stay its prudent course of looking to the concrete facts of a case to determine what right is at issue. *Glucksberg*, 521 U.S. at 722-724.

Respondent and Amicus ACLU have been unable to identify the basis for this new right to flight, but appear to claim that this right to flight is based, at least in part, on the Due Process Clause of the Fourteenth Amendment.[9] Respondent's clandestine claim of a substantive due process right to flight fails to appreciate that the issue of the reasonableness of his seizure lies squarely under the umbrella of the Fourth Amendment. This Court has refused to search the substantive depths of the relatively narrow Due Process Clause and implement its corresponding analytical framework when there is a specific constitutional amendment that establishes and governs the right at issue. *See Graham v. Connor*, 490 U.S. 386 (1989). As a

[8] Respondent also refers to the "choice to refuse police contact" and not "to tolerate police inquiries;" the "core right of all persons to avoid police in the absence of objective evidence of criminality;" the "freedom of movement;" and the all-encompassing "suspicious conduct that is otherwise constitutionally protected." (Res. Br. 27-28, 38) Amicus ACLU supplements this litany with the "unqualified right to stand or move about on the streets;" the "power of locomotion," and the right to "move on." (ACLU Br. 4-6, 8, 14)

[9] Both Respondent and Amicus ACLU cite to the plurality opinion in *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999), and *Kolender v. Lawson*, 461 U.S. 352 (1983) (Res. Br. 38; ACLU Br. 6-7). Neither of these cases, however, support Respondent's claim of a fundamental right to flight. In both cases, a majority of the Court addressed the constitutionality of loitering ordinances under the traditional vagueness analysis of the Fourteenth Amendment. Those decisions did not recognize any constitutionally protected conduct akin to that at issue here. Rather, a majority of the Court determined that the respective ordinance was vague because it was capable of arbitrary enforcement. *Kolender*, 461 U.S. at 359; *Morales*, 119 S. Ct. at 1864. These cases, and the textually-based analysis therein employed, are inapplicable.

general matter, this Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115 (1991). Rather, this Court has limited the Due Process Clause to a relatively narrow group of non-enumerated substantive rights, which are "otherwise homeless." *Albright v. Oliver*, 510 U.S. 266, 288 (1994) (Souter, J., concurring). Following this approach, this Court has rejected the proposed application of substantive due process in cases, such as this one, where the underlying constitutional right was secured by the Fourth Amendment. *See Graham*, 490 U.S. at 394-95[10]; *see also Albright*, 510 U.S. at 272 (Rehnquist, C.J., plurality opinion). In light of this clear precedent, Respondent's proposed right to flight, or any lesser component of that right, cannot be considered a substantive due process right and, as such, his claim must be analyzed exclusively under the Fourth Amendment.[11]

Respondent's proposed restructuring of the Fourth Amendment, however, is based on a frail and flawed logical framework. Respondent proclaims that he has a constitutional right to avoid police contact. (Res. Br. 26-27) Respondent then reasons that flight is nothing more than an anticipatory refusal to cooperate with a police officer's potential decision to approach. (Res. Br. 26-27) Respondent completes his enigmatic progression by stating that there must be no

[10] In *Graham*, this Court held that a section 1983 claim alleging excessive force during an arrest must be analyzed under the objective reasonableness standard of the Fourth Amendment. This Court rejected the idea of reliance on a "generic right," instead of the Fourth or Eighth Amendment, which were the "two most textually obvious sources of constitutional protection." *Graham*, 490 U.S. at 393. The Court explained: "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham*, 490 U.S. at 395.

[11] Interestingly, the Court has recently said that *Rochin v. California*, 342 U.S. 165 (1952), which established the "shock the conscience" test for due process violations, would be decided under the Fourth Amendment, and not the Fourteenth Amendment, if decided today. *County of Sacramento v. Lewis*, 523 U.S. 833, n.9 (1998).

restrictions on the manner in which he is allowed to exercise this right and, as such, he can certainly refuse to avoid police contact and go on his way at top speed. (Res. Br. 30) Presto—Respondent has turned unprovoked flight at top speed from a clearly identifiable police officer into a constitutionally protected right. And in so doing, Respondent has asked this Court to focus on an ill-defined constitutional right at the expense of the balance struck by this Court in *Terry*, and at the expense of the straight-forward issue that balance presents as applied in this case: whether unprovoked flight from a clearly identifiable police officer gives that officer reasonable suspicion that criminal activity may be afoot.

Respondent's innovative theoretical posturing is entirely inconsistent with the very fabric of this Court's decision in *Terry v. Ohio* and its 30 years of progeny. Imagine if Respondent's claim of removable and free-standing rights, unfettered by countervailing societal interests, were applied in *Terry v. Ohio*. Officer McFadden could not have considered that Terry was standing on a street corner speaking with other individuals as that would have improperly infringed upon Terry's right of assembly or association. Nor could Officer McFadden consider that he observed Terry and his companion walking back and forth in front of a store window as that would impermissibly infringe on his right to move freely. Finally, Officer McFadden could not consider that when he walked up to Terry and his companions and asked for their names, they mumbled something in response because such mumbling was, at the very least, an implicit refusal to cooperate if not an exercise of protected First Amendment conduct. Thus, Officer McFadden could not have detained Terry because Terry was just engaging in constitutionally protected conduct.

The Court, however, upheld Officer McFadden's action as a reasonable seizure under the Fourth Amendment. In so doing, the Court looked at the entire spectrum of interests and balanced them to determine what was reasonable; the Court did not examine Terry's conduct or that of Officer McFadden in a vacuum. The Court specifically considered the "rapidly unfolding and often dangerous situations on the city streets," the need for an "escalating set of flexible responses," the interests of effective law enforcement, and the limited nature of an investigatory detention. *Terry*, 392 U.S. at 10-11. This Court also considered the principles that "the authority

of the police must be strictly circumscribed by the law of arrest and search" and the need for a "requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution." *Terry*, 392 U.S. at 11-12. The reasonable suspicion standard forged in *Terry* represents the sound constitutional balance used to assess a citizen's right to be free from unreasonable seizures that this Court has applied consistently. This Court has never altered the balance struck in *Terry* and has never recognized any independent or free-standing rights that roam unfettered within the rubric of the Fourth Amendment.[12] Respondent's proposed right is inconsistent with the entire bulwark of this Court's Fourth Amendment jurisprudence which has repeatedly rejected the existence of such a right.[13]

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[12] *Brown v. Texas*, 443 U.S. 47 (1979), does not support Respondent's claim of a right to flight. Respondent correctly notes that *Brown* determined that a refusal to identify oneself after the investigative detention occurred could not be used as a bootstrap to justify the original stop. Respondent, however, then makes the unwarranted assumption that "an individual's decision to refuse contact cannot be used to justify the stop." (Res. Br. 29) In so arguing, Respondent has incorrectly characterized the holding of *Brown* as a complete bar to any consideration, by the police and the courts, of any conduct that could be interpreted as an implied refusal to cooperate. Respondent portrays *Brown* as a prophylactic measure by overlooking the central fact that Brown's refusal occurred after the baseless investigatory detention.

[13] *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258 (1990). Respondent relies on basic propositions culled from a line of cases, including the plurality opinion in *Florida v. Royer*, 469 U.S. 491 (1983), *Florida v. Bostick*, 501 U.S. 429 (1991), and *United States v. Mendenhall*, 446 U.S. 544 (1980), in crafting his right to flight. These cases, however, do not support Respondent's claim of a right to flight. Rather, these cases discuss when a seizure occurs, generally in the context of a police-citizen encounter. In *Royer*, the encounter in an airport between Royer and the police was initially consensual, even when officers asked Royer for his airline ticket and driver's license, and that encounter did not become a seizure until Royer was escorted to a small room while the officers kept his driver's license, airline ticket and luggage. Similarly in *Mendenhall*, the encounter in the airport was initially consensual even after Mendenhall agreed to accompany the agents to an office approximately 50 feet away where she consented to the search of her person and

(continued...)

Respondent's assertion of a new right to flight is particularly circumspect as it asks this Court to stray from its precedent to give constitutional protection to a hazardous activity that lacks any redeeming value. Respondent conveniently ignores this Court's controlling decision in *California v. Hodari D.*, 499 U.S. 621 (1991), in advancing his right to flight.[14] In *Hodari D.*, this Court expressly rejected the expansion of the Fourth Amendment to protect the respondent's flight from police, stating "We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges." *Hodari D.*, 499 U.S. at 627; *see also Michigan v. Chesternut*, 486 U.S. 567, 576-77 (1988) (Kennedy, J., concurring). This Court also recognized the highly questionable value of flight, stating that "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged." *Hodari D.*, 499 U.S. at 627.

Respondent's entire theoretical framework ignores the fundamental and undeniable differences between the flight from an identifiable police officer and a mere refusal to cooperate.[15] *See People v. Souza*,

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(...continued)
handbag. A majority of the Court in two separate opinions ruled the stop and subsequent search were valid. Finally, in *Bostick*, two officers acting as part of a routine drug interdiction encountered defendant on a bus and asked to see his ticket and identification. After Bostick's ticket and identification were returned to him, the officers asked to search his bag and the defendant consented. This Court ruled the search was subject to a valid consent. The refusal to cooperate, let alone flight from the police, was never at issue in these cases. Instead, Respondent elevates a description of a potential outcome of a police-citizen encounter from a series of distinguishable cases and presents it as a fundamental and affirmative right to flight.

[14] Amicus Rutherford Institute apparently recognizes the controlling nature of this Court's decision in *Hodari D.* on the issue of a right to flight and asks this Court to overrule its prior decision. There is no reason for the Court to revisit its sound decision, however, especially as all considerations raised by Amicus were apparent to the Court in *Hodari D.*

[15] Respondent's reliance on *Brown v. Texas* also exhibits a fundamental flaw that runs throughout Respondent's argument: unprovoked flight from a (continued...)

9 Cal. 4th 224, 234-35, 885 P.2d 982 (1994) (because flight "shows not only an unwillingness to partake in questioning but also unwillingness to be observed and possibly identified, it is a much stronger indicator of the consciousness of guilt"). A refusal to cooperate cannot be expanded to encompass the aberrant behavior of flight just because a minor aspect of a refusal to cooperate is implicit in flight. Flight injects an unreasonable level of urgency into an otherwise ordinary encounter and is also assuredly motivated by more than a desire not to cooperate, since an individual would not unnecessarily draw attention to himself unless his fear of detection and the reward of escape were great.[16] This is especially so where a mere refusal would successfully accomplish the very same goal supposedly justifying the need for his right to flight.[17]

In sum, Respondent's call for a constitutional right to flight should be rejected as he has been unable to sufficiently define this amorphous right or provide a definitive constitutional provision in which that right is grounded. Respondent's claim that the right to flight is a substantive due process right must be rejected where his investigatory detention falls squarely under the Fourth Amendment. Any recognition of a free-standing right within the rubric of the Fourth

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(...continued)
clearly identifiable police officer cannot be equated with a mere refusal to cooperate as was involved in *Brown*.

[16] Amicus Rutherford Institute cites to Proverbs 22:3: "A prudent man sees danger and takes refuge" in its critique of this Court's opinion in *Hodari D.* This principle, however, demonstrates the relevance of flight—a prudent criminal sees danger and takes refuge.

[17] The facts of this case demonstrate that the framework adopted by this Court in establishing the continuum of police-citizen contacts is well-grounded and not in need of an overhaul. Here, Respondent was standing in front of a building when he made eye contact with a clearly identifiable police officer and fled. Respondent could have stood there or walked away. The officers could have approached him and asked him a question, asked for identification or followed alongside him. *Florida v. Bostick*, 501 U.S. at 434; *Michigan v. Chesternut*, 486 U.S. at 574-75. Respondent could have refused the officer's request and walked away. There is no need to skew this wide spectrum of reasonable behavior that both the citizen and officer could undertake by recognizing the right to flight.

Amendment would unnecessarily disrupt the balance struck in *Terry* to grant constitutional protection to hazardous and aberrant behavior.

5. The Subjective Motivations of Police Officers Have No Play in Fourth Amendment Jurisprudence.

The Amici briefs of the ACLU and the NAACP, filed in support of Respondent, ask this Court to take into consideration that African-Americans and other minorities may flee from police because of fear that they will be subjected to harassment. (ACLU Br. 8-21; NAACP Br. 21-24) Such a position is in reality a veiled invitation to reconsider the Fourth Amendment analysis established in *Terry*. In essence, amici request this Court to reconfigure the objective reasonable suspicion inquiry to include the subjective motivations of rogue police officers. Moreover, amici also ask this Court to establish a separate *Terry* analysis based on the individual characteristics of the person seized. However, *Terry* and more recent precedent of this Court firmly establish that Fourth Amendment jurisprudence entails an objective assessment of police action in which the subjective motives of police officers are irrelevant. The Fourth Amendment is and should remain "color blind" in the protection of the citizenry as a whole.

In support of their position, both aforenoted amici cite to documented cases where police officers have engaged in discriminatory law enforcement tactics. However, as acknowledged by the ACLU, these isolated incidents do not show that most police officers engage in such behavior. (ACLU Br. 24) Unfortunately, discriminatory law enforcement tactics at the hands of some rogue police officers are and have been a reality. However, this is not a novel concern for this Court. The *Terry* Court considered this very issue when it crafted the reasonable suspicion doctrine. Significantly, prior to addressing the propriety of temporary investigatory stops on the basis of reasonable suspicion, the *Terry* Court pointed out that "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial." *Terry*, 392 U.S. at 14-15. Thus, the *Terry* Court itself was fully cognizant of and shared amici's concerns regarding discriminatory

law enforcement. Rather than craft *Terry* to encompass this issue, as amici would have this Court do, the *Terry* Court opted to create an objective test of reasonable suspicion. The remedy for the *Terry* Court was not the alteration of the *Terry* doctrine and the resultant exclusion of evidence. Instead, the *Terry* Court encouraged the employment of remedies other than the exclusionary rule to curtail such abuses. 392 U.S. at 15.[18]

Hence, the *Terry* Court set clear parameters concerning Fourth Amendment jurisprudence by establishing that the Fourth Amendment contemplates an objective assessment of law enforcement actions and the subjective motives of police officers play no part in the evaluation of search and seizure issues. To now countenance amici's suggestion, to consider the subjective motivations of police officers with respect to particular racial characteristics of the citizenry, would undermine *Terry* itself. The very reason *Terry* is workable is because of its objectivity.

Significantly, the boundaries set in *Terry* have been re-affirmed in more recent cases by this Court. In *Scott v. United States*, this Court stressed the fact that "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." 436 U.S. 128, 137 (1978). Hence, this Court held that "the fact the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott*, 436 U.S. at 138. This Court further acknowledged that motives are not always to be disregarded in a suppression inquiry, but stated that the focus on intent becomes relevant *only*

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[18] In doing so, this Court explained that "rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." 392 U.S. at 15. "And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate." 392 U.S. at 15.

after a court determines that the Constitution was in fact violated. *Scott*, 436 U.S. at 139.

Significantly, this Court re-affirmed the position that a police officer's actual motivations cannot invalidate a seizure which is objectively justified in the recent case of *Whren v. United States*, 517 U.S. 806 (1996). This Court also held that the claim of selective law enforcement on the basis of race plays no part in the Fourth Amendment analysis. In that regard, this Court held that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment Analysis." 517 U.S. at 813. Thus, in light of *Scott* and *Whren*, this Court should reject the amici's veiled invitation to revisit the analysis established in *Terry*.[19] The subjective motivations of police officers should not now be allowed to alter the *Terry* doctrine.

Moreover, this Court's Fourth Amendment jurisprudence wisely perceives the Fourth Amendment as a "color blind" constitutional provision. To place a judicial stamp of approval on the application of different standards based on the race of the subject would upset the objectivity that makes *Terry* workable. *Terry* works, constitutionally, precisely because it can be scrutinized, and applied, in an objective manner that applies—across the board—to the citizenry as a whole. Applying amici's varying standards to different races would actually inject racial profiling into the constitutional analysis, thereby producing the opposite effect desired by Respondent's amici. Petitioner urges this Court to refrain from embarking on such a dangerous journey. The Fourth Amendment must remain color blind, as it always has been.

[19] Notably, Respondent has never raised the claim that he was subjected to a *Terry* stop on the basis of his race. As pointed out by *Terry* and *Whren*, had Respondent made such an allegation, he would have had other remedies available to him, including a Section 1983 claim, an equal protection claim and any administrative remedy available at the state or city level.

6. Law Enforcement Officials Do Not Engage In Provocative Conduct When Four Police Cars Containing Eight Officers Simply Drive Down A Street Together.

Respondent argues that the "police must observe, and not create, articulable suspicion." (Res. Br. 21) In other words, Respondent insists that the police cannot provoke those factors which in turn give them articulable suspicion to conduct a *Terry* stop. This is exactly what Petitioner in its opening brief clearly and repeatedly stated, perhaps to the point of *ad nauseam*, namely, that Respondent's flight must be *unprovoked* for a lawful seizure to occur.

Respondent goes on to state that, "arguably and inferentially," in the instant case the sight of four police vehicles containing eight officers constituted provocation.[20] (Res. Br. 24) Respondent's argument assumes too much. As the record establishes, four police cars containing eight officers were driving, or as Officer Nolan termed it, "caravanning," eastbound on Van Buren Street. (J.A. 8) It was as they were proceeding down Van Buren Street when Officer Nolan, who was driving the last car, first saw Respondent. (J.A. 4, 8-9)

Respondent's contention that the flight in this case was provoked strains credulity. The thought that the simple act of driving through a city street would be so provocative as to cause pedestrians to scatter and run through gangways and alleys would make practically all police activity provocative.

B.

A Person's Unprovoked Flight At The Mere Sight Of An Identifiable Police Officer In A High Crime Area Provides The Particularized Grounds For Reasonable Suspicion That Criminal Activity May Be Afoot.

Respondent agrees that flight is one factor to be considered in determining if reasonable suspicion is present for a *Terry* stop. (Res.

[20] Respondent notes that the Illinois Appellate Court and the Illinois Supreme Court have never characterized his flight as being unprovoked. (Res. Br. 22) This is of course true for the obvious reason that Respondent has never questioned, at any level, whether his flight was provoked by the police and has, in fact, argued directly to the contrary below.

Br. 24, 30) Also, Respondent does not dispute this Court's jurisprudence and Professor LaFave's statement that a high crime location is a highly relevant consideration in determining reasonable suspicion.[21] (Pet. Br. 37-40) Logically then, if both flight and location are relevant factors in determining reasonable suspicion, they each must carry weight. If this Court disagrees that unprovoked flight from a clearly identifiable police officer is insufficient standing alone, it is Petitioner's position that when the weight of both factors is added together, the combined weight adds up to reasonable suspicion.[22]

In order to escape the obvious, that Respondent's flight in a high crime area produces a reasonable suspicion that crime may be afoot, Respondent attempts, as the Illinois Appellate Court did before him, to eliminate the location factor from consideration. Respondent insists that the high crime area here was not sufficiently localized or identified as, for example, in *Minnesota v. Dickerson*, 481 N.W.2d 840 (Minn. 1992), where the area was localized to a single building. In making this statement, however, Respondent simply ignores the five cases from this Court that Petitioner cited in its opening brief and the size of the geographical areas that this Court found relevant to probable cause and reasonable suspicion. (Pet. Br. 37-39)

Additionally, Respondent apparently ignores that the trial judge credited the testimony of Officer Timothy Nolan and found the area in question to be a high narcotics crime area. (J.A. 14) This Court must defer to this finding of historical fact reliably made by the trial judge. *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996). Accordingly, the Illinois Supreme Court partially overruled the Appellate Court's opinion and held that the location where Respondent was standing was indeed "a high crime area." (J.A. 19-20) The supreme

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[21] Amicus ACLU agrees that a geographic area may be considered when deciding whether reasonable suspicion exists. (ACLU Br. 27)

[22] Amicus ACLU argues that when flight and location are the only two factors to be considered, the location cannot be the decisive factor in determining reasonable suspicion. (ACLU Br. 27) Petitioner submits that it is a pointless exercise to ponder whether location is the determining factor and flight is the underlying factor or *vice versa*. The point is that, when combined, they amount to reasonable suspicion.

court's holding was more than adequately supported by the record as evidenced by the following colloquy:

> Q. And let me ask you, Officer, why was it that you went to *that location* on that date and time?
>
> A. It's *one of the areas* in the 11th District that's high narcotics traffic. (J.A. 7-8)

Thus, as can be plainly seen, Officer Nolan, a member of the Special Operations Section, was specifically assigned that day to patrol certain areas *within* the 11th District that had a high incidence of narcotics crime.[23] One of these locations was the area of 4035 West Van Buren. Further, as the Illinois Supreme Court held, and as Petitioner initially pointed out, Officer Nolan's statement that the location at 4035 West Van Buren was a high narcotics crime area was "uncontradicted and undisputed" by defense counsel during the suppression hearing.[24] (Pet. Br. 40, J.A. 19) Thus, Respondent's assertion that 4035 West Van Buren was not sufficiently identified as a high crime area is baseless and should be rejected by this Court.

In sum, the high crime location here was sufficiently identified and, when coupled with flight, provided individualized reasonable suspicion. Accordingly, the officer was entitled to make a brief investigatory stop. If not, Officer Nolan would have been left to shrug his shoulders and watch a person who was possibly wanted on a warrant, an escapee from jail or who had committed a crime, to simply run away.

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[23] As such, Respondent's assertion that the high crime area that Officer Nolan was referring to was a vast, undefined, heavily populated neighborhood of nearly 100,000 people encompassing the whole 11th District is incorrect. (Res. Br. 34)

[24] This could well have been because, as the record establishes, Respondent had two pending cases for possessing, as well as selling, narcotics at 3841 and 3843 West Van Buren, a mere two blocks from 4035 West Van Buren. (R. B21, B25-B29)

CONCLUSION

For the aforementioned reasons, and for the reasons stated in Petitioner's opening brief, the judgment of the Illinois Supreme Court should be reversed and this case remanded for further proceedings.

Respectfully submitted,

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(6)

No. 98-1036

In the Supreme Court of the United States

STATE OF ILLINOIS, PETITIONER

v.

SAM WARDLOW

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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2 Pet

QUESTION PRESENTED

Whether respondent's sudden and unprovoked flight from an identifiable police officer in a high-crime area gave rise to a reasonable suspicion that respondent was involved in criminal activity, justifying a temporary investigative detention.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether and under what circumstances an individual's flight from an identifiable police officer will give rise to a reasonable suspicion of criminal wrongdoing justifying a temporary investigative detention. The Court's resolution of that question will affect the practices of federal law enforcement agents who encounter that situation. The disposition of this case will also affect the admission in federal prosecutions of evidence obtained by federal, state, and local police officers who apprehend suspects after such flight.

STATEMENT

1. On September 9, 1995, Police Officer Timothy Nolan, a nine-year veteran with the Chicago Police Department, was investigating narcotics sales in the

11th District. Officer Nolan and his partner Officer Harvey were among eight officers in four police cars traveling in a "caravan" east on West Van Buren Street. Officers Nolan and Harvey were in the last car of the caravan. Officer Nolan was dressed in full police uniform, which included his badge, name tag, and Chicago Police Department arm patch. At the hearing conducted on respondent's motion to suppress, Officer Nolan testified that the area in question had a high incidence of narcotics trafficking. Officer Nolan further testified that he did not remember if his police car was marked or unmarked. Pet. App. 1-2, 13-14; J.A. 4, 7-10.

As the four cars traveled down West Van Buren, Officer Nolan noticed respondent Sam Wardlow standing in front of 4035 West Van Buren, looking in their direction. When respondent saw the officers approaching, he began to run. He was carrying a white opaque bag under his arm. As Officers Nolan and Harvey followed in their car, respondent ran south down a gangway and through an alley, but the officers caught up with and cornered him. Officer Nolan conducted a protective "pat-down" search of respondent and the bag he was carrying.[1] When he squeezed the bag, Officer Nolan felt a hard object similar in shape to a revolver. Officer Nolan looked inside the bag and found a .38 caliber Colt handgun loaded with live rounds of ammunition. Respondent was then arrested. Pet. App. 1-2, 15; J.A. 4-11.[2]

---

[1] Officer Nolan testified at the suppression hearing that he "conducted a protective pat down for [his] own safety" before asking respondent any questions. J.A. 6. The officer also testified that in his experience it is common for weapons to be found in the vicinity of drug trafficking activities. J.A. 11.

[2] Officer Nolan's arrest report indicates that respondent was arrested at 12:15 p.m. Pet. App. 2 n.1, 15.

2. Following his indictment on various weapons charges, respondent filed a motion to suppress the seized gun. After conducting an evidentiary hearing at which Officer Nolan testified to the events leading to respondent's arrest, the trial court denied the motion. J.A. 13-15. The court observed that "[a]lmost anybody can identify a police car marked or * * * unmarked," J.A. 14, and it concluded that "once a person flees after having looked in the direction of the officer there's reasonable—there's reason to think there's a problem, they have a right to make inquiry," J.A. 15.

After a bench trial at which the parties stipulated to the testimony introduced at the suppression hearing, respondent was convicted of unlawful use of a weapon by a felon and sentenced to two years' imprisonment. Pet. App. 15; 12/6/95 Tr. 15-20.

3. The Appellate Court of Illinois reversed. Pet. App. 13-19. The court found Officer Nolan's testimony "simply too vague to support the inference that [respondent] was in a location with a high incidence of narcotics trafficking." *Id.* at 17. The court then held that respondent's "sudden flight from an area past which police officers were driving" was insufficient, standing alone, to "satisfy the requirements for a lawful investigatory stop." *Id.* at 18.

4. The Supreme Court of Illinois affirmed. Pet. App. 1-12. The court found that "Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area." *Id.* at 5. It therefore framed the question presented by the appeal as "whether an individual's flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop of the person." *Ibid.* The court agreed with respondent that "such flight

alone is insufficient to create a reasonable suspicion of involvement in criminal conduct." *Ibid.*

Relying substantially on the Nebraska Supreme Court's decision in *State* v. *Hicks*, 488 N.W.2d 359 (1992), cert. denied, 507 U.S. 1000 (1993), the court concluded that a rule permitting investigative stops based on flight alone would "upset the balance struck in *Terry* [v. *Ohio*, 392 U.S. 1 (1968),] between the individual's right to personal security and the public's interest in prevention of crime." Pet. App. 7 (quoting *Hicks*, 488 N.W.2d at 364). The court explained:

> Flight upon approach of a police officer may simply reflect the exercise—at top speed—of the person's constitutional right to move on. *Terry* and [*Florida* v. *Royer*, 460 U.S. 491 (1983),] stand for the proposition that exercise of this constitutional right may not itself provide the basis for more intrusive police activity.
>
> * * * * *
>
> A prime concern underlying the *Terry* decision is protecting the right of law-abiding citizens to eschew interactions with the police. Authorizing the police to chase down and question all those who take flight upon their approach would undercut this important right.

Pet. App. 6-7 (quoting *Hicks*, 488 N.W.2d at 363-364) (citation and quotation marks omitted). The court thus agreed with respondent's argument that "[i]f the police cannot constitutionally force otherwise law-abiding citizens to move, the police cannot force those same citizens to stand still at the appearance of an officer." *Id.* at 8.

The Illinois Supreme Court further concluded that the high incidence of narcotics trafficking in the pertinent area did not give rise to a reasonable suspicion that respondent was engaged in wrongdoing. The court noted that the officers "were not responding to any call or report of suspicious activity in the area." Pet. App. 10. It observed as well that respondent "gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan's vehicle," but "was simply standing in front of a building when the officers drove by." *Ibid.* The court concluded that "because Officer Nolan was not able to point to specific facts corroborating the inference of guilt gleaned from [respondent's] flight, his stop and subsequent arrest of [respondent] were constitutionally infirm." *Id.* at 12. The court accordingly affirmed the judgment of the Illinois Appellate Court reversing respondent's conviction. *Ibid.*

SUMMARY OF ARGUMENT

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its progeny, this Court held that the Fourth Amendment permits brief investigative stops based on "reasonable suspicion" of criminal wrongdoing. To protect the safety of the officers conducting such a stop, moreover, when law enforcement officers have a reasonable suspicion that the individual may be armed and dangerous, they may conduct a limited search for weapons. The reasonable suspicion standard does not require an officer to have probable cause to believe that an individual has committed a crime. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989). Rather, it requires only "some minimal level of objective justification," *INS* v. *Delgado*, 466 U.S. 210, 217 (1984), for believing that the individual "is, or is

about to be, engaged in criminal activity," *United States* v. *Cortez*, 449 U.S. 411, 417 (1981).

Respondent's sudden and unprovoked flight from the caravan of police cars and a uniformed police officer gave rise to a reasonable suspicion of his possible involvement in criminal activity. Law enforcement officers have historically treated flight as a suspicious circumstance warranting further investigation. This Court has repeatedly held that efforts to evade police scrutiny are directly relevant to reasonable suspicion and probable cause determinations. The Court has also recognized that flight may properly be treated as probative (though not conclusive) evidence of guilt in a criminal prosecution.

Flight from an identifiable police officer may be susceptible of innocent explanations. The purpose of a *Terry* stop, however, is not to apprehend persons who are known to be guilty of criminal offenses; it is to clarify situations in which unlawful activity is suspected but probable cause has not been established. Unprovoked flight from identifiable police officers is ordinarily a sufficiently valid indicator of illicit conduct to justify a brief investigative stop. Although such flight *may* be undertaken for innocent reasons, it is not behavior in which innocent persons commonly engage —and it is far more likely to signal a consciousness of wrongdoing and a fear of apprehension. An immediate investigatory seizure is especially appropriate in these circumstances because the effect of flight is often to foreclose the possibility of further observation of the individual that might reveal additional signs of unlawful behavior.

To treat flight as a basis for an investigative stop does not unlawfully impair an individual's right to avoid contact with the police. If respondent had paid no

attention to the officers, or had continued on his prior course of conduct or activity, his decision to do that despite the police presence would not (by itself) have justified an investigative stop. Instead, respondent dramatically altered his conduct in response to the officers' arrival, in an evident attempt to avoid police scrutiny. That pattern of activity is much more aberrational, and much more uncharacteristic of innocent persons, than a simple insistence on freedom from official interference.

ARGUMENT

RESPONDENT'S UNPROVOKED FLIGHT FROM POLICE OFFICERS PATROLLING A HIGH-CRIME AREA GAVE RISE TO A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND JUSTIFIED A TEMPORARY INVESTIGATIVE STOP BY THE POLICE

A. The Fourth Amendment Permits Limited Investigative Stops And Attendant Protective Searches Based On Reasonable Suspicion Not Rising To The Level Of Probable Cause

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. Under well-established precedent, the formal arrest of an individual is "reasonable" only if it is based on probable cause to believe that the person has engaged in unlawful activity. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 417, 421 (1976). The probable cause standard also applies, as a general matter, in determining the reasonableness of "searches." See, *e.g.*, *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989); *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987).

Since its decision in *Terry* v. *Ohio*, 392 U.S. 1 (1968), however, this Court has recognized that not every restriction on personal privacy or liberty sufficient to constitute a "search" or "seizure" requires the degree of individualized suspicion necessary to satisfy the probable cause standard. Rather, the Court's decisions establish that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989). As the Court has explained:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. *Williams*, 407 U.S. 143, 145-146 (1972) (citation omitted).

The Court in *Terry* also recognized that an officer should not be required to take unreasonable risks when, in an investigatory stop, the suspect may be "armed with a weapon that could unexpectedly and fatally be used against him." *Terry*, 392 U.S. at 23. Rather, "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in

scope to this protective purpose." *Adams*, 407 U.S. at 146 (footnote omitted); see also, *e.g.*, *Minnesota* v. *Dickerson*, 508 U.S. 366, 373 (1993) (an officer in conducting a *Terry* stop may search "on the basis of reasonable suspicion less than probable cause," so long as the search is "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby").

The standard applicable to investigative stops and pat-down searches under *Terry*—a standard most often characterized as "reasonable suspicion"—"effects a needed balance between private and public interests." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 541 (1985). Although the reasonable suspicion standard precludes random or arbitrary seizures, or those based merely on a subjective "hunch," the burden of justification that it imposes "is considerably less than proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7. Rather, that standard requires only "some minimal level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. 210, 217 (1984); see also, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").[3]

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[3] Although investigatory stops are often based on the seizing officer's firsthand observation of a suspect's unusual or idiosyncratic behavior, the reasonable suspicion standard can be satisfied even without such observations. For example, an informant's tip may furnish reasonable suspicion for an investigative stop, particularly if some details of the tip are verified independently. See, *e.g.*, *Alabama* v. *White*, 496 U.S. 325, 329-332 (1990). Reasonable suspicion may also exist where an individual closely matches the description of the perpetrator of a prior crime. See, *e.g.*,

B. Flight Has Historically Been Treated As Probative Evidence Of Involvement In Criminal Activity

Under the foregoing principles, respondent's unprovoked flight from the caravan of police cars and a uniformed police officer furnished a sufficient objective basis for the officers to form a reasonable suspicion that he was involved in criminal activity. Law enforcement officers have historically treated flight as a suspicious circumstance warranting further investigation. As one empirical study of police investigative practices concluded, "[c]ertainly, officers on patrol assume that flight is strong evidence of guilt. They almost always attempt to stop and question a person who flees from them, even though they suspect no specific crime." Lawrence P. Tiffany et al., *Detection of Crime* 32 n.19 (Frank J. Remington ed. 1967). Because flight "may seem to indicate both the existence of a crime and participation in it by the person who flees," *id.* at 19, "[a] person who * * * changes his direction in an apparent attempt to avoid confronting [a police] officer, or who flees at the sight of an officer will commonly be detained and questioned," *id.* at 32.[4]

United States v. *Simpson*, 992 F.2d 1224, 1226 (D.C. Cir.) (investigative stop was justified where the seized individual "was wearing clothing similar to that described by the victim, was of the same general age group * * *, was of the same race and physical build of the alleged rapist, and was in the vicinity of the crime"), cert. denied, 510 U.S. 906 (1993). An officer's observation of "suspicious" behavior is therefore a frequent but not a necessary predicate for an investigative stop.

[4] We are aware of no empirical studies regarding the frequency with which persons detained on the basis of flight are found to be involved in criminal activity. Pursuit of fleeing suspects, however, is difficult and potentially dangerous. Officers would likely not devote their energies to the pursuit of fleeing persons unless those

That historical practice is eminently reasonable. This Court has repeatedly held that efforts to avoid police scrutiny are directly relevant to reasonable suspicion and probable cause determinations. See, *e.g.*, *Sokolow*, 490 U.S. at 8-9 (suspect's "evasive or erratic path through an airport," and his apparent use of an alias, were factors relevant to the reasonable suspicion inquiry); *Florida* v. *Rodriguez*, 469 U.S. 1, 6 (1984) ("Respondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion."); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("erratic driving or obvious attempts to evade officers can support a reasonable suspicion"); *Sibron* v. *New York*, 392 U.S. 40, 66-67 (1968) ("deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest"); *Husty* v. *United States*, 282 U.S. 694, 701 (1931) (finding of probable cause for search of automobile was based on, *inter alia*, "the prompt attempt of [the defendant's] two companions to escape when hailed by the officers").[5]

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efforts played a genuine and necessary role in detecting and preventing crime. The absence of any obvious motive for police abuses reinforces the appropriateness of deference to the judgment and experience of trained police officers.

[5] Cf. *California* v. *Hodari D.*, 499 U.S. 621, 623 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense."); *Michigan* v. *Chesternut*, 486 U.S. 567, 576 (1988) (Kennedy, J., concurring) ("It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for respon-

To treat flight as evidence of possible criminal conduct is consistent not only with this Court's Fourth Amendment jurisprudence, but with well-established principles of substantive criminal law. More than a century ago, this Court observed that "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen* v. *United States*, 164 U.S. 492, 499 (1896). Although flight cannot properly be treated as "conclusive proof of guilt," *Hickory* v. *United States*, 160 U.S. 408, 421 (1896), "the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt," *Alberty* v. *United States*, 162 U.S. 499, 510 (1896).[6]

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dent's unprovoked flight gave the police ample cause to stop him."); *United States* v. *Sharpe*, 470 U.S. 675, 705 (1985) (Brennan, J., dissenting) ("where police officers reasonably suspect that an individual may be engaged in criminal activity, and the individual deliberately takes flight when the officers attempt to stop and question him, the officers generally no longer have mere reasonable suspicion, but probable cause to arrest").

[6] This Court has often looked to common-law principles in assessing the Fourth Amendment reasonableness of various types of searches and seizures. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995); *United States* v. *Watson*, 423 U.S. 411; 418-419 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 111, 114 (1975); *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925). At common law, flight created so strong a presumption of guilt that the flight of one accused of treason, felony, or petit larceny resulted in the forfeiture of his goods and chattels, whether he was found guilty or acquitted. See, *e.g.*, *Hickory*, 160 U.S. at 418; 4 William Blackstone, *Commentaries* 387 (St. George Tucker ed. 1803); 2 John Henry Wigmore, *Evidence* § 276, at 122 & n.1 (James H. Chadbourn ed. 1979 & Supp. 1999). This Court has moderated the common-law approach, holding that evidence of a defendant's flight may not be treated as raising a conclusive presumption of guilt, while recognizing that such evidence has probative value and may

C. Respondent's Sudden Flight From Identifiable Police Officers Gave Those Officers Reasonable Suspicion That He Was Involved In Criminal Activity

Courts that have refused to treat flight as a sufficient basis for a *Terry* stop have offered two basic justifications for that holding. First, courts have sometimes reasoned that flight by itself is ambiguous, since it may have been inspired by innocent motives. See, *e.g.*, *Watkins* v. *State*, 420 A.2d 270, 273-274 (Md. 1980). Second, courts have expressed the view that an individual's right to avoid contact with police would be impaired if flight were accepted as a sufficient basis for an investigative stop. See, *e.g.*, Pet. App. 6-7; *State* v. *Hicks*, 488 N.W.2d 359, 363-365 (Neb. 1992), cert. denied, 507 U.S. 1000 (1993); *State* v. *Talbot*, 792 P.2d 489, 493-494 (Utah Ct. App. 1990); *People* v. *Shabaz*, 378 N.W.2d 451, 460-461 (Mich. 1985). Neither of those rationales withstands scrutiny.

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properly be submitted to the jury. See *Allen*, 164 U.S. at 498-499; *Alberty*, 162 U.S. at 508-511; *Hickory*, 160 U.S. at 416-423. The courts of appeals have continued to recognize that evidence of flight may properly be admitted in a criminal trial to show consciousness of guilt. See, *e.g.*, *United States* v. *Candelaria-Silva*, 162 F.3d 698, 705 (1st Cir. 1998); *United States* v. *Amuso*, 21 F.3d 1251, 1258-1259 (2d Cir.), cert. denied, 513 U.S. 932 (1994); *United States* v. *Murphy*, 996 F.2d 94, 96-97 (5th Cir.), cert. denied, 510 U.S. 971 (1993); *United States* v. *Hegwood*, 977 F.2d 492, 498 n.3 (9th Cir. 1992), cert. denied, 508 U.S. 913 (1993); *United States* v. *Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991). Accord, *e.g.*, 2 Wigmore, *supra* § 276, at 122 ("It is universally conceded today that the fact of an accused's flight * * * [is] admissible as evidence of consciousness of guilt, and thus of guilt itself."); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 85 (2d ed. 1994); 2 John W. Strong et al., *McCormick on Evidence* § 263 (4th ed. 1992).

1. Sudden flight from an identifiable police officer may be susceptible of innocent explanations. Investigative detentions are routinely based, however, on conduct that is neither inherently blameworthy nor definitely indicative of criminal behavior. As the Court explained in *Sokolow*,

> "Innocent behavior will frequently provide the basis for a showing of probable cause," and * * * "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." That principle applies equally well to the reasonable suspicion inquiry.

490 U.S. at 10 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 243-244 n.13 (1983)).

Indeed, the point of this Court's *Terry* stop jurisprudence is to enable police officers "to adopt an intermediate response" when they possess a degree of individualized suspicion not rising to the level of probable cause. *Adams*, 407 U.S. at 145. Situations in which probable cause is lacking are by definition situations in which the suspect's behavior is susceptible of an innocent explanation.[7] Thus, "[d]oubtless, many innocent explanations for [respondent's] conduct could be hypothesized, but suspicious activity by its very

[7] Even the probable cause standard applicable to an arrest or full-scale search requires only a "fair probability" that the suspect has committed criminal acts or that the specified items will be found in the location to be searched. *Sokolow*, 490 U.S. at 7; *Gates*, 462 U.S. at 238. "[T]he level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause" and requires "considerably less than proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7.

nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal." *State* v. *Jackson*, 434 N.W.2d 386, 391 (Wis. 1989).[8]

The propriety of the investigative stop in this case therefore does not depend on a showing that respondent's flight unequivocally evidenced his involvement in criminal activity. Rather, the stop was appropriate so long as respondent's behavior provided the "minimal level of objective justification" necessary to satisfy the reasonable suspicion standard. *Sokolow*, 490 U.S. at 7 (quoting *INS* v. *Delgado*, 466 U.S. 210, 217 (1984)). Unprovoked flight from identifiable police officers is ordinarily a sufficiently probative indication of illicit conduct to justify a brief investigative stop. Although

[8] To the extent that innocent people flee from the police, seizures undertaken on the basis of flight will sometimes result in incursions on the liberty of persons who have committed no crime. That prospect, however, does not make such stops unconstitutional. As the Court has explained in the context of searches, the Fourth Amendment's reasonableness requirement

> does not demand that the government be factually correct in its assessment [of] what a search will produce. * * * If a magistrate, based upon seemingly reliable but factually inaccurate information, issues a warrant for the search of a house in which the sought-after felon is not present, has never been present, and was never likely to have been present, the owner of that house suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment.

Illinois v. *Rodriguez*, 497 U.S. 177, 184 (1990). The same principle applies to *Terry* stops—except that the reasonable suspicion standard contemplates a greater willingness to tolerate the seizure of persons who turn out to be innocent, in light of the lesser intrusion that such stops entail.

such flight *may* be undertaken for innocent reasons, it is not behavior in which innocent persons commonly engage. Compare *Reid* v. *Georgia*, 448 U.S. 438, 441 (1980) (circumstances that "describe a very large category of presumably innocent travelers" could not provide the basis for an investigative stop). As the Wisconsin Supreme Court has explained,

> [f]light at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well.

State v. *Anderson*, 454 N.W.2d 763, 766 (1990); see also 4 Wayne R. LaFave, *Search and Seizure* § 9.4(f), at 181-182 (3d ed. 1996) (agreeing that "behavior which evinces in the mind of a reasonable police officer an intent to flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police").

The Illinois Supreme Court appeared to agree that an individual's flight from the police is relevant to the reasonable suspicion inquiry. It concluded, however, that an investigative detention is permissible only "if there are corroborating circumstances sufficient to create the reasonable suspicion necessary for the stop." Pet. App. 8. As we explain above, unprovoked flight is sufficiently unusual, and sufficiently uncharacteristic of innocent persons, to satisfy the reasonable suspicion standard. There is, however, an additional flaw in the

court's suggestion that officers observing a individual's flight should seek evidence "corroborating" the inference of possible criminal involvement. In many if not most cases, the effect of flight is to foreclose the possibility that close observation of the individual will reveal additional signs of unlawful behavior. An immediate seizure is particularly appropriate in cases, like the present one, in which officers have no practical alternative means of further investigating the suspicious individual. Cf. *Adams*, 407 U.S. at 146 ("A brief stop of a suspicious individual, in order to determine his identity *or to maintain the status quo momentarily while obtaining more information*, may be most reasonable in light of the facts known to the officer at the time.") (emphasis added).

This Court has emphasized that in determining whether an investigative stop was supported by reasonable suspicion, "the totality of the circumstances—the whole picture—must be taken into account." *Cortez*, 449 U.S. at 417. Cases may occasionally arise in which other contextual factors refute the inference of criminal activity that would otherwise attend an individual's flight from identifiable police officers.[9] In this case, however, the only additional circumstance bearing on the reasonable suspicion inquiry was the fact that the episode occurred in a high-crime area. An individual's presence in a high-crime neighborhood is not in itself sufficient to justify an investigative stop.

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[9] For example, an officer who moved towards an individual while shouting threats of violence or instructing people to clear an area could not plausibly construe that person's flight as evidence of involvement in illicit conduct. No such circumstances, however, are present in this case; the flight, instead, was entirely unprovoked.

See *Brown* v. *Texas*, 443 U.S. 47, 52 (1979). Nor is presence in a high-crime area necessary to justify an officer's conclusion that sudden and unprovoked flight from an identifiable police officer gives rise to reasonable suspicion. But presence in such an area may contribute to a finding of reasonable suspicion when combined with other relevant circumstances, such as the flight in this case.[10]

2. In *Florida* v. *Royer*, 460 U.S. 491 (1983), a plurality of this Court stated that an individual who is approached by the police

> need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Id. at 498 (opinion of White, J.) (citation omitted). Some courts—including the Illinois Supreme Court in this case—have concluded that a *Terry* stop based on an individual's flight from the police impairs the individual's right to "go on his way" and is therefore inconsistent with *Royer*. See Pet. App. 6-7 (quoting *Hicks*, 488 N.W.2d at 363-364); *Talbot*, 792 P.2d at 494; *Shabaz*, 378 N.W.2d at 458, 460-461. That reasoning is erroneous.

[10] See, *e.g.*, *United States* v. *Brown*, 159 F.3d 147, 149-150 (3d Cir. 1998), cert. denied, 119 S. Ct. 1127 (1999); *United States* v. *Gutierrez-Daniez*, 131 F.3d 939, 942-943 (10th Cir. 1997), cert. denied, 118 S. Ct. 1334 (1998); *United States* v. *Atlas*, 94 F.3d 447, 450-451 (8th Cir. 1996), cert. denied, 520 U.S. 1130 (1997); *United States* v. *Evans*, 994 F.2d 317, 322 (7th Cir.), cert. denied, 510 U.S. 927 (1993); *United States* v. *Lender*, 985 F.2d 151, 154 (4th Cir. 1993); *United States* v. *Lucas*, 778 F.2d 885, 888 (D.C. Cir. 1985) (per curiam). See also 2 LaFave, *supra* §3.6(g), at 335 ("To require police to disregard facts which, as a practical matter, are highly relevant to the determination of probable cause, would do violence to the underlying purpose of the Fourth Amendment's probable cause requirement and would in fact do a disservice to the 'honest citizen' residing in a high-crime area.") (footnote omitted).

The general constitutional bar on suspicionless seizures of the person reflects the fact that an individual has a liberty interest in pursuing his chosen course of conduct free from official interference. In the *Terry* stop context, that interest may be overridden if, but only if, government officials have an objective basis for suspecting that the individual may be involved in criminal or similar wrongful behavior. The bar on suspicionless seizures would be effectively negated if the police could request that an individual stop voluntarily, and then treat his refusal to do so as the basis for a compulsory stop. Thus, the Court has "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991). The *Royer* plurality's recognition of the individual's right to "go on his way," 460 U.S. at 498, and its assertion that the exercise of that right cannot provide the basis for a stop, *ibid.*, are best understood to refer to situations in which a person simply refuses to cease or modify his behavior in response to police entreaties.

Respondent, by contrast, did not insist on hewing to his predetermined course of conduct. To the contrary, respondent dramatically altered his behavior in direct response to the officers' arrival, and in an evident attempt to avoid police scrutiny. That pattern of activity is much more aberrational, and much more uncharacteristic of innocent persons, than is a simple insistence on freedom from official interference. To treat such

behavior as grounds for an investigative stop would not permit suspicionless seizures. Had respondent simply ignored the officers, his refusal to alter his behavior in response to their arrival would not have furnished a basis for an investigative stop. Recognition of that principle adequately protects the individual's right to be free from arbitrary government intrusion. It is both unnecessary and counterproductive to take the further step of barring police from drawing the inferences that naturally flow from sudden and dramatic shifts in private conduct.[11]

It is true that no state or federal law prohibited respondent from taking flight when Officer Nolan appeared. In that sense it is accurate to say that respondent had a "right" to flee and could not be punished for that behavior. As we explain above, however (see pp. 14-15, *supra*), *Terry* stops are routinely undertaken on the basis of conduct that is not inherently unlawful.[12] In *Terry* itself, the two suspects simply strolled down a

[11] We do not suggest that police can "force otherwise law-abiding citizens * * * to stand still," Pet. App. 8, or that running in the opposite direction from identifiable law enforcement officers can under all circumstances be regarded as suspicious behavior. A marathoner engaged in a training run could rush past police officers without arousing reasonable suspicion. And that would be so even if the runner ignored a shouted police request for a voluntary interview. Under those circumstances, it would be accurate to say that the individual had "exercise[d] his constitutional right to 'go on his way'—at top speed." *Shabaz*, 378 N.W.2d at 460. The suspicious aspect of respondent's behavior was not running per se. It was the fact that respondent deviated dramatically from his prior course of conduct in response to the officers' arrival, and for the apparent purpose of avoiding police scrutiny.

[12] Indeed, a *Terry* stop will sometimes be appropriate even where police have not observed the suspect engaging in any form of suspicious or unusual conduct. See notes 3, 8, *supra*.

street and peered into a street window, met with and conversed with a third person, and continued on their way—but in a manner that gave rise to the suspicion that they were casing the store for a possible robbery. 392 U.S. at 5-6. The fact that respondent could not be punished for the flight itself did not preclude the police from treating the flight as evidence of possible involvement in criminal activity. Cf. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").[13]

[13] For essentially the same reasons that the investigative stop in this case was permissible, Officer Nolan was justified in conducting a protective pat-down of respondent's person. Respondent's flight suggested both that he might be involved in illicit activity, and that he might be willing to take extreme measures to avoid police questioning. Officer Nolan testified that the area in which the stop occurred was known for "high narcotics traffic," and that in his experience weapons are commonly found in the vicinity of such areas. J.A. 8, 11. Based on those factors, Officer Nolan "had reasonable grounds to believe that [respondent] was armed and dangerous." *Terry*, 392 U.S. at 30. It was also reasonable for Officer Nolan to feel the opaque bag that respondent carried. A weapon could as easily be concealed in the bag—and as quickly retrieved—as if it were hidden under respondent's clothing. Compare *Michigan* v. *Long*, 463 U.S. 1032, 1045-1052 (1983) (police conducting a vehicle stop reasonably searched areas of the car, including a leather pouch, over which the suspect would have immediate control, and that might contain a weapon). Thus, while the right to conduct an investigative stop does not *invariably* include the right to perform a weapons frisk, *id.* at 1049 n.14, the pat-down of respondent and his bag was reasonable under the circumstances of this case.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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No. 98-1036

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THE STATE OF ILLINOIS,
Petitioner,

vs.

SAM WARDLOW,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF WAYNE COUNTY PROSECUTING ATTORNEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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44P

STATEMENT OF QUESTION

I.

DOES A PERSON'S SUDDEN, UNEXPLAINED, AND UNPROVOKED FLIGHT FROM A CLEARLY IDENTIFIABLE POLICE OFFICER PROVIDE REASONABLE GROUNDS TO BELIEVE THAT CRIMINAL MISCHIEF IS AFOOT?

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I.

A PERSON'S SUDDEN, UNEXPLAINED, AND UNPROVOKED FLIGHT FROM A CLEARLY IDENTIFIABLE POLICE OFFICER PROVIDES REASONABLE GROUNDS TO BELIEVE THAT CRIMINAL MISCHIEF IS AFOOT

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INTEREST OF THE AMICUS

Amicus is the Prosecuting Attorney for Wayne County, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. Charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, the outcome of the current litigation is a matter of primary interest to *Amicus*, as its outcome will directly affect the execution of his constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties. However, *Amicus* has obtained Petitioner's permission to file a supporting brief on its behalf.

STATEMENT OF THE CASE

Amicus relies upon the parties to provide this Court with the particulars of the instant case.

SUMMARY OF ARGUMENT

Under any common understanding of the Fourth Amendment concept of "reasonable search and seizure", unprovoked flight from the presence of police invites their pursuit and justifies the temporary detention of the one fleeing, for purposes of discovering the reason for such behavior: A police officer would be foolishly naive to ignore such an event, and it provides an objective basis for a reasonable officer to suspect criminal wrongdoing.

ARGUMENT

I.

A PERSON'S SUDDEN, UNEXPLAINED, AND UNPROVOKED FLIGHT FROM A CLEARLY IDENTIFIABLE POLICE OFFICER PROVIDES REASONABLE GROUNDS TO BELIEVE THAT CRIMINAL MISCHIEF IS AFOOT.

> *"The wicked flee when no man pursueth...."*
> PROVERBS, 28:1

This case squarely presents a recurring question the Court left open in *Michigan v Chestermut*, 486 US 567 (1988) and *California v Hodari D*, 499 US 621 (1991) — namely, whether a citizen who bolts from the presence of a uniformed police officer gives the officer any reason to suspect that foul play is afoot, and any reason to detain the citizen to see whether the suspicions have a basis in fact.[1]

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[1] The lower court holding suggests a conceptual problem underlying cases such as this one: the Illinois Supreme Court appears to assume that police must have evidence of "some independently suspicious circumstance" to corroborate any "inference of a guilty conscience associated with flight at the sight of the police." *People* v *Wardlow*, 183 Ill 2d 306; 233 Ill Dec 634; 701 NE2d 484, 486 (1998). However, *Terry* is not so restrictive: in fact, the Court took care to note that it based the holding on the "Fourth Amendment's general proscription against unreasonable searches and seizures," *Terry* v *Ohio*, 392 US 1, 20 (1968), and found that the critical point was not proof of any specified criminal acts, but rather an objectively reasonable cause for concern. *Terry*, at 20-24. And other jurisdictions note that the gravamen of "reasonable suspicion" is not proof positive, but "ambiguity"—specifically, some objectively reasonable basis for drawing an inference of wrongful conduct. *See, eg, State* v *Anderson*, 155 Wis 2d 77, 84; 454 NW2d 763, 765 (1990); *Platt* v *State*, 589 NE2d 222, 226 (Ind, 1992).

Amicus also notes that requiring *corroboration* of suspicious circumstances — while necessary to establish proof beyond a reasonable doubt at trial or probable cause for arrest — appears inconsistent with the very notion of "suspicious circumstances" in the first place. By their very nature, "suspicious circumstances" giving rise to "reasonable suspicion" will be ambiguous: if no ambiguity existed, we would have

Given the holding below, this Court must intervene to broaden a curiously narrow construction of the word "reasonable" in the context of the Fourth Amendment, and return courts to the common understanding of the word. In doing so, the Court will decide whether our Constitution permits police to use common sense in situations when an officer sees someone bolt from his presence — *ie*, whether the only constitutionally reasonable course is for the officer to shrug his shoulders and continue about his business; or whether the Constitution permits him to discover what the problem may be, and why someone would flee from what would otherwise be a non-threatening, reassuring presence.

Thus, the controlling question in this case is whether a policeman's act of detaining a citizen who flees from his presence, for purposes of investigating the cause of his action, constitutes an unreasonable response to the citizen's flight under the Fourth Amendment.

A.
HISTORY AND ETYMOLOGY
1.
Digression and Resolution

In 1791, newly independent and with a vivid memory of the oppressions of the Crown that fueled their Revolution,[2] the practical idealists who founded this Nation inserted into

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either unambiguously innocent conduct, or probable cause to arrest. And the whole point of investigating in the first place is so that the police can *garner* the corroboration needed to resolve the ambiguity, one way or the other.

[2]Actually, the historical record suggests that the Revolution stemmed as much from the colonists' reluctance to pay the costs of protecting themselves from the French and the Indians as from any real tyranny by the Crown. See, Middlekauf, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 (1982), pp 49-93, for a good summary of how British clumsiness and Yankee parsimony contributed to popular support for the ensuing revolt. See also, Trevelyan, THE AMERICAN REVOLUTION (MORRIS ED) (1964), pp 1-56.

its new Constitution a protection from the potential abuses of a strong central government. Inserted into the new charter by early amendment,[3] the Fourth Amendment sought to prevent the intrusiveness that came by way of judicial writ, which had allowed agents of the Crown to conduct wide-ranging and wholesale searches seeking to discover violations of the law. As adopted, the provision read:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

As with many advances in the Law, the Fourth Amendment arose in response to specific and documented abuses, and examining its historical context shows its general nature and intended limits. Most scholars agree that the Fourth Amendment's warrant requirement stemmed from opposition, both here and in England, to the British Government's use of general warrants as a tool to enforce government policy, and this Court has often noted the connection between such abuses and the language of the Fourth Amendment's warrant clause, *see, eg, Boyd* v *United States*, 116 US 616, 624-633 (1886); *Marcus* v *Property Search Warrant*, 367 US 717, 724-729 (1961); *Frank* v *Maryland*, 359 US 360, 363-366 (1959); *Stanford* v *Texas*, 379 US 476, 481-486 (1965), remarking in *Boyd* that although such practices "may suit the purposes of despotic power, [they] cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd, supra* at 631-632. Drawing on this heritage, the Court has construed the scope and purpose of the Fourth Amendment as a bulwark against

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[3]*See* I STAT 97.

governmental intrusions, finding that it gives citizens the right to "shut the door" on government officials who demand entry into their homes and property without proper authorization. *Frank* v *Maryland*, *supra* at 365.

A common thread links our early cases with the abuses of the colonial writs of assistance — the fear that unrestricted governmental power to force entry into private dwellings will lead to tyranny, by stifling the voices of nonconformity. Such fears led this Court to hold the "security of one's privacy against arbitrary intrusion by the police" to be a fundamental right guaranteed by the Fourteenth Amendment, *Wolf* v *Colorado*, 338 US 25, 27 (1949); *Mapp* v *Ohio*, 367 US 643, 650 (1961), and to the general rule that official entry onto private property needs judicial authorization. *Michigan* v *Tyler*, 436 US 499 (1978). In fact, the early history of the Fourth Amendment suggests that its main concern was the forced entry and search of a dwelling. Earlier abuses had fired opposition to the colonial writs of assistance; and early decisions banning the use of unlawfully seized evidence show the Court's sensitivity to governmental invasions of private homes: In *Weeks* v *United States*, 232 US 383 (1914), the Court would ban from use in federal courts evidence unlawfully seized during a warrantless, and hence unlawful, entry into the citizen's home. And in *Agnello* v *United States*, 269 US 20, 33 (1925), the Court rejected the notion that the unquestioned existence of probable cause alone provided blanket justification for a warrantless entry into a home, holding that the mere belief, "however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant." *See also*, *Gambino* v *United States*, 275 US 310 (1927); *Byars* v *United States*, 273 US 28 (1927). *See generally*, LaFave & Israel, CRIMINAL PROCEDURE, (1984), Ch 3, pp 132 ff.

Thus, the early cases suggest a preoccupation with official entries into private property, stemming from Coke's maxim that "every man's house is his castle." Coke, THIRD INSTITUTE; H. Broom, LEGAL MAXIMS, 321-329. *Cf*,

Semayne's Case, 5 Co Rep 91a; 77 Eng Rep 194 (KB, 1603). And while extending the concept of "reasonable seizure" to persons outside a dwelling is well within the language of the Fourth Amendment, the Court came to recognize that the differences in circumstance mandated a difference in approach: The Constitution did not, after all, proscribe attempts at maintaining public order; and one venturing into public assumes a continuing duty to behave in accordance with the dictates of civilization. Moreover, while history shows that permitting the discretionary invasion of private property carries with it the seeds of tyranny, the infinite variety of human conduct requires that the State have the flexibility needed to maintain the public peace and enforce some minimal standards of civility. Therefore, where one's conduct gives the police reasonable grounds to believe he has committed a crime, the common law, recognizing the compelling public interest in law enforcement, justified intruding upon his liberty interests in order to effect an arrest,[4] 4 Blackstone, COMMENTARIES, 292; *Samuel* v *Payne*, 1 Dougl 359; 99 Eng Rep 230 (KB, 1780); *Kurtz* v *Moffitt*, 115 US 487 (1885); and the Constitution, building upon this heritage, concurred. *United States* v *Watson*, 423 US 411 (1976). Accordingly, where the police have reasonable grounds to believe that a specific person has committed a crime, they may arrest him without a warrant. *United States* v *Watson*, *supra*. *Cf*, *Draper* v *United States*, 358 US 307 (1958)(Holding "probable cause" synonymous with "reasonable grounds).

Still, the power to arrest extends the powers of the police no further than that of a magistrate to order the arrest in the first place. *Gerstein* v *Pugh*, 420 US 103 (1975). And for years, courts construed any significant intrusion on one's right

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[4]Actually, the common law also placed substantial burdens on the citizenry, to help the authorities apprehend lawbreakers. See 4 Blackstone, COMMENTARIES, 293, for an explanation of the role of the "hue and cry."

of free passage to be an arrest — judging the legality of that intrusion by determining whether probable cause existed at the moment of the stop, rather than by any facts discovered later. *Henry* v *United States*, 361 US 98; 80 S Ct 168; 4 L Ed 2d 134 (1959). This forced courts to view any police-citizen interaction in one of two ways: either as a full arrest, subject to the probable cause standard; or as a non-event, unrelated to the restrictions or limitations of the Fourth Amendment.[5] However, the ambiguities of human interaction proved such rigidity inadequate to the task of maintaining order in a complex and changing society, forcing the Court to modify its approach. And in *Terry* v *Ohio*, 392 US 1 (1968), the Court would make a fundamental shift in the focus of the Fourth Amendment that leads us to the case at hand.

In *Terry*, a veteran police officer had observed some men standing on a street corner, going through an elaborate ritual of strolling casually past a store window and looking inside, then returning to the corner. After they repeated this ritual continuously for 10 or 12 minutes, the officer concluded that they might be planning a robbery, and that it was his duty to investigate the matter further. Approaching the men, he identified himself as a police officer and asked for identification; fearing they might be armed, he patted down the outside of Terry's clothing and found a gun. Frisking the others, he found a gun on one of them and took them to the

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[5]One must also remember that, less than a decade earlier, this Court had radically altered the legal landscape with its landmark decision in *Mapp* v *Ohio*, 367 US 643 (1961).

Considering the matter from a practical standpoint, it was one thing for federal courts to exert control over federal law enforcement, limited jurisdictionally to prosecuting federal crimes; it was quite something else to try to exercise such control over local law enforcement, which had the responsibility of maintaining order and keeping the peace in a wide variety of local environments. See the concurring opinion of Justice Harlan in *Coolidge v New Hampshire, supra*, expressing concern that the concerns and problems of local authorities may serve to distort the principled application of the Fourth Amendment.

police station, where Terry and a companion were formally charged with carrying concealed weapons. On the defendants' motion to suppress evidence, the trial court dismissed the notion that the officer had probable cause to arrest the defendants before he discovered the weapons; however, distinguishing between an investigatory stop and a full arrest, the court found that the officer had reasonable grounds to believe that the defendants were "conducting themselves suspiciously," and therefore had the right to make further inquiry into their actions. And given his right to investigate, it followed that he had the right to conduct a frisk for weapons, in order to guarantee his own safety.

On *certiorari*, this Court affirmed. Rejecting claims that the Fourth Amendment applied only in cases of full custodial arrest, the Court found that a "seizure" in the constitutional sense occurs whenever a police officer restrained the freedom of a citizen to go his own way. And the Court deemed that it require "torture of the English language" to find that "a careful exploration of the outer surfaces of a person's clothing...in an attempt to find weapons is not a 'search.'" *Terry v Ohio, supra* at 16. Even so, the Court carefully distinguished the two severable Clauses of the Fourth Amendment — the "Warrant Clause" and the "Reasonableness Clause" — to apply the policies and protections of the Constitution in a situation which did not lend itself to the time constraints of legal process:

> "If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case....[W]e deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to

> the warrant procedure. Instead, the conduct involved must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry v Ohio*, at 20.

Noting that courts can assess a search's reasonableness of aonly by "balancing the need to search against the invasion which the search entails," *Terry*, at 21, quoting *Camara* v *Municipal Court*, 387 US 523, 535-536 (1967), the Court stressed the need for an objective standard of review, since relying upon the officer's subjective good faith would reduce the Fourth Amendment to mere words. Thus, when judging whether the specific facts available to the police justified a particular intrusion, courts would ask whether a hypothetical "reasonable man" would find that "the facts available to the officer at the moment of the seizure or the search warrant[ed] a man of reasonable caution in the belief that the action taken was appropriate." *Terry*, at 21-22.

Given the general public interest in "effective crime prevention and detection," *Terry*, at 22,[6] the Court found it constitutionally unobjectionable for an officer to approach and briefly detain a citizen on the street, even in the absence of probable cause, so long as he has observed "unusual

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[6]Actually, the concept of "reasonable search and seizure," need not be hostile to efforts to enforce the law. US CONST, Preamble. *Cf*, Rousseau, THE SOCIAL CONTRACT, (Penguin Ed, 1988), pp 64-65 (Noting that Man acquires freedom only through the institution of Law). The primary purpose of government is, after all, protecting its citizens; and however honest or idealistic it might be, a government which fails to fulfill this fundamental goal has failed in its most basic function. It follows that the Constitution cannot demand law enforcement methods which are ineffective to enforce the law, unless the Law itself wishes to abdicate its position of ruling authority. And the abdication of the Rule of Law would lead either to tyranny or anarchy — the current state of affairs in Somalia being witness to what happens whenever the governing authority cannot, or does not, govern. *Cf*, Hobbes, LEVIATHAN, (III Bohn Ed, 1839), pp 110-118 (Noting that "where there is no common power, there is no law").

conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry, supra* at 30. In such cases, a brief investigative detention to confirm or dispel his suspicion is reasonable, since the overriding public interest in preventing crime outweighs the minor inconvenience to the person detained.

The pivotal point of reasonableness established, the Court has since grappled with the limitations and logical consequences of its approach. But "reason" by its very nature depends not on some immutable formula but upon the "totality of the circumstances — the whole picture," *United States v Cortez*, 449 US 411, 417 (1981). Thus, the existence of "reasonable suspicion" will depend not upon the possibility of an innocent explanation for observed conduct, but rather upon a confluence of factors which, taken together, warrant further investigation. *United States* v *Sokolow*, 490 US 1 (1989). And as this Court noted in *Cortez*, courts must realize that they are dealing not in "hard certainties," but rather in relative probabilities:

> "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same — and so are law enforcement officers." *Cortez*, at 418.

Accordingly, while "reasonable suspicion" as a concept still eludes successful articulation, *compare, eg, Sokolow, supra* with *Florida* v *Royer*, 460 US 491 (1983), the cases agree that "reasonable suspicion" falls some degrees short of "probable cause," *Sokolow* at 10; *Royer* at 500, and that courts must make some concessions to the same ambiguities of life that make articulating the parameters of "reason" such a daunting task.

However, applying the concept of "reasonableness" to police conduct presents the danger of judicial chaos: reason, like beauty, is often a subjective judgment; and without a clear consensus on the contours of "reason," the unrestrained

judicial application of a "rule of reason" will lead to law enforcement by the whims of judges just as surely as vesting unlimited discretion in the police would place the liberty of all "in the hands of every petty officer."[7] Even so, to the extent that language conveys a common meaning, we may limit the judge's discretion by words; and so long as the traditions of the Law require adherence to precedent,[8] and our search for Law seeks underlying principles of common application rather than decisions based on the subjective preferences of the individual jurist, judging police actions by applying the concept of "reason" gives courts a needed flexibility in dealing with situations as infinitely diverse as life itself, and to which no single rule crafted by the limited human mind can address in all its permutations.

Toward this end, this Court analyzes police-citizen encounters using a three-tier framework in applying the Fourth Amendment: Initially, police may approach any citizen on the street for the purpose of asking him questions, without any level of justification under the Fourth Amendment; the citizen, however, is equally free to ignore the police and proceed upon his way unrestrained — and his mere refusal to cooperate provides no basis for his detention. *Florida* v *Royer*, 460 US 491, 497-498 (1983); *United States* v *Mendenhall*, 446 US 544, 555 (1980). *Cf, Davis* v *Mississippi*, 394 US 721 (1968); *Brown* v *Texas*, 443 US 47 (1979). The next level of encounter is the prototypical *Terry*-stop — permitting police to detain a citizen and search him for offensive weapons, but requiring the officer to have

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[7]Cf, *Frank v Maryland, supra* at 364, quoting Tudor, LIFE OF JAMES OTIS (1823), p 66.

[8] Actually, one surveying American law in the 1960's might find reason to question the role of precedent in American jurisprudence. *Compare, eg, Mapp v Ohio, supra* with *Wolf v Colorado, supra*, or *Malloy* v *Hogan*, 378 US 1 (1964) with *Twining* v *New Jersey*, 211 US 78 (1908), *Snyder* v *Massachusetts*, 291 US 278 (1936) and *Cohen* v *Hurley*, 366 US 117 (1961).

a reasonable, articulable suspicion of wrongdoing. *Terry v Ohio, supra; Florida v Royer*, at 498-501; *Brown v Texas*, at 51. And the third level of encounter is a full-blown arrest — requiring probable cause. *Dunaway* v *New York*, 442 US 200 (1979); *Florida v Royer*, at 499-501. Thus, the applicable standard of justification will vary, depending on the intrusiveness of the encounter, since the concept of "reasonable search and seizure" imposes different standards for different levels of intrusions, *cf, Florida v Royer*, at 500; *Terry v Ohio*, at 19.

Unfortunately, in Law as in many disciplines, elemental concepts often go unexamined, and while the Court developed a general test for determining the question of "seizure," *United States v Mendenhall*,(Would a reasonable person in similar circumstances believe he was not free to leave), the Court's preference for the "case by case" resolution of basic principles ordained that progress would be slow. Not until *Chesternut*, for example, did the Court explore the parameters of a "seizure" in the context of a "chase;" and even there, the Court deferred making a definitive decision for another three years, in *Hodari*.

In this case, the Court confronts a question that it has twice deferred — namely, whether a citizen who flees at the mere sight of the police gives the officers reason briefly to detain him. The accumulated folk-wisdom of several thousand years, noting that "[t]he wicked flee when no man pursueth," PROVERBS, 28:1, suggests that the answer is an unqualified "yes," and a wealth of authority from more contemporary sources seems to agree. *See, eg, State* v *Anderson*, 155 Wis 2d 771; 454 NW2d 763 (1990); *Platt* v *State*, 589 NE2d 222 (Ind, 1992). But this case will decide whether our understanding of the Fourth Amendment remains consistent with such ancient wisdom, or reflects a more modern deconstruction of the concept of "reasonableness,"

within the context of the Fourth Amendment.[9]

2.

History, Language, and the Constitution

"Human history becomes more and more a race between education and catastrophe."

H. G. Wells, THE OUTLINE OF HISTORY (1949 Ed), p 1198.

Given the specific limitation of the Fourth Amendment to "unreasonable searches and seizures," *Amicus* submits that we must address the Framer's conception of reasonableness before we can analyze the Fourth Amendment's application to the present case. After all, unless one adopts the notion that the Judicial Powers of government include the right to rewrite any text which does not accord with the Judiciary's institutional or subjective preferences,[10] we must accept the limitations of language placed upon words enacted into law, for rejecting such notions of judicial limits means rejecting

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[9] Much of the case law on point stems from civil actions. *See, eg, Tennessee v Garner, supra, Brower v Inyo County, supra, Malley* v *Briggs*, 475 US 335 (1986).

Though running the risk of converting the Fourth Amendment from a source of protection for citizens against a potentially abusive government into a source of income for a potentially abusive plaintiff's bar, this could lead one to wonder if the developing body of civil law has undercut deterrent rationale of exclusionary rule enough to cast into doubt its wisdom and legitimacy. This is a question which this Court has noted in the past, and may wish to revisit in the future. *Cf, Stone* v *Powell*, 428 US 465, 496 (1976)(Burger, CJ, concurring). *See also, Wolf v Colorado, supra* at 28-29 (Noting the wide-scale rejection of the exclusionary rule throughout Anglo-American jurisprudence).

[10]Curiously, many modern commentators appear to adopt such a view. *See, eg,* Brest, *The Misconceived Quest for the Original Understanding*, 60 BUL REV 204 (1980); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV L REV 1189 (1987); Steiker, *Second Thoughts About First Principles*, 107 Harv L Rev 820 (1994). Whether such a view reflects enlightened scholarship, the commentators' own subjective political preferences, or a fundamental distrust of the results of democratic self-government, remains to be seen.

the wisdom, as well as the enacted Law, of prior generations.

The historical record shows that the imprecision of language was a problem familiar to the Framers of our Constitution. Madison, for example, wrote perceptively of the limitations of words as a medium of communication. "The use of words is to express ideas," he wrote in THE FEDERALIST:

> "Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that...the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty Himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated." THE FEDERALIST, No. 37.

Within the limits of human language, courts have a unique power and a burdensome responsibility: while the Judiciary gives substance to Law, through the power of adjudication, a court's first responsibility is to give form and substance to the Lawmaker's intent. While this implies the need for constant attention to detail, applying the rules of society in the context of the infinite diversity of creation, it also requires the judge to apply not his own subjective preferences, but those of the Lawmaker — to adopt not the construction best suited to the judge's personal conception of Justice, but rather to enforce the law given him by statute,

constitution, or precedent. THE FEDERALIST, No. 78. *See, eg, Printz v United States*, 521 US 98 (1997); *Carroll v United States*, 267 US 132, 149-150 (1925.

While it is unlikely that the Framers anticipated the revolution in transportation and communication that has transformed our country, we can often apply their underlying principles of government to many cases arising today, and when this is possible, there is no need for further guidance from the Legislature or the people. However, a court is never free to disregard History in favor of furthering a judge's subjective point of view. And where the policies underscoring the provisions of the Constitution conflict with a judge's own preference, it is the Constitution — the Framers' policy choices, as reflected in the Framers' own language — which must control. THE FEDERALIST, No. 78. *Cf, Printz v United States*; *Carroll v United States*.

History teaches us that the Framers were, in many respects, sons of the French Enlightenment, Durant, ROUSSEAU & REVOLUTION (1967), p 867, and thus products of their era's admixture of rationality, tolerance, and secular optimism that elevated "reason" into a mainstay of human discourse: in this view, Man was flawed but perfectible, and the use of human reason to the resolution of problems seemed to provide the key to all human endeavors.[11] Still, the

[11]Actually, their application of reason to contemporary problems often contains lessons for our own epoch — in fields as diverse as economics, *see*, A. Smith, THE WEALTH OF NATIONS (1776)(Noting the concept of enlightened self-interest), politics, *see*, Montesquieu, THE SPIRIT OF THE LAWS, (1748)(Postulating an animating "spirit" for each major system of governance — "honor" for monarchies; "virtue and civic consciousness" for democracies; and "fear" for despotism — and noting the dire consequences of each permitting a weakening of its defining spirit), or religion. *See*, Hume, DIALOGUES CONCERNING NATURAL RELIGION (1779)(Positing that absolute certainty is possible only in field of mathematics; all else, depending upon "matters of fact," are open to question).

On the other hand, as one authority has noted, in this era of hope and

Enlightenment remained, at its core, a religious age, Gay, AGE OF ENLIGHTENMENT (1966), p 31, and contemporary philosophers struggled with efforts to find common ground between reason and faith: the Cambridge Platonists, for example, saw the two as complementary, rather than conflicting, seeing in Christianity the practice of reason, virtue, and mystical contemplation. Gay, at 31-32.

Viewed through the lens of History, there seems no basis to conclude that the Framers would have regarded a police officer's act of detaining a citizen who bolted from his presence to lack a basis in reason: as they would have been well acquainted with PROVERBS 28:1, it would have seemed unremarkable that a constable would seek to learn the reason why someone might flee, rather than trying to rationalize the behavior. Moreover, in their less secular era, many would have deemed the wisdom contained in Proverbs to be revealed word of God, and their conception of public duty in a democracy would have included order and obedience to greater authority. *See*, THE FEDERALIST, No. 26 (Noting the "citizens of America have too much discernment to be argued into anarchy" and applauding the "deep and solemn conviction in the public mind that greater energy of government is essential to the welfare and prosperity of the community"). It is unlikely that they would have regarded

optimism "the difference between open-mindedness and gullibility was often indiscernible," Gay, at 65, and some Enlightenment thinkers are more valuable for providing a cautionary tale, rather than food for thought: one such visionary in the field of law was Johann Lavater, who specialized in the "science" of physiognomy — the belief that one's outward appearance was a reliable indication of character. He claimed the ability to spot a murderer merely by studying his face, and advocated moving courts past the orthodox, unenlightened forms of 18th Century jurisprudence, since all judges had to do was follow certain "physiognomic" rules to tell whether an accused was guilty or innocent. Gay, at 68. Though grateful to be spared the dubious benefits of some "cutting edge" 18th Century science, *Amicus* occasionally harbors doubts about some forms of "pseudo-science" in our own day.

flight from a constable to be an indication of anything other than a guilty conscience — and inconceivable that they would have deemed it a cause for the constable to avert his eyes, rather than move to protect the community he was sworn to serve. It strikes *Amicus* as equally inconceivable that they would have found the degree of intrusiveness stemming from the mere presence of an officer on a public street to be a cause of concern[12] — except to one with a guilty conscience, to whom any approach will be a threat, and apprehension anticlimactic. *Cf*, Poe, THE TELL-TALE HEART, (1845).

Thus, on the basis of the Framer's choice of language, it appears that the lower court erred in deciding this case, and that this Court should rectify the matter without further delay.

B.

PARADIGMS LOST

"The laws of a nation form the most instructive part of its history."

Edward Gibbon, THE DECLINE AND FALL OF THE ROMAN EMPIRE (1776)

At risk of being lost amid the points and counterpoints of law professors, commentators, and litigants, it appears to *Amicus* that this case presents a simple fact pattern with deceptively wide-ranging ramifications — for the legal resolution of the pattern will speak volumes about our legal institutions, about the kind of Society we are today, and the kind of Society we may become in the future. Therefore, let us consider the ramifications of two conflicting responses to the following paradigm:

> *A police officer, walking through a crowd on busy street, smiles and greets the passers-by as they go about their business. As one young man calmly turns*

[12]We might also note that for the first 174 years of this Country's existence, the notion that the Fourth Amendment could limit the ability of local authorities to enforce law and order on their own streets was a concept alien to the Federal Constitution. *Compare, eg, Mapp v Ohio,* with *Wolf v Colorado,* and *Irvine v California.*

> *to face the officer, a look of abject panic crosses his face — and immediately, he turns and bolts down the street, running away from the officer as fast as he can.*

As this case discloses, there are two basic responses to such an occurrence:

(1) *"Isn't that interesting," the officer says to himself, as he continues walking.*

(2) *"Stop!" commands the officer, who pursues and stops the young man to find out why the latter is running from him.*

To the extent that the Law commands one response over the other, the ramifications are telling:

1.

"See no Evil...."

The defense argument,[13] and the Illinois Supreme Court,

[13]Respondent also claims that Petitioner favors a constitutional rule that "any person who avoids the police in a high crime area may be stopped for investigation." BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, p 7. Such an overstatement of the true issue strikes *Amicus* as telling: It is, after all, quite likely that most people would rather avoid most interactions with the police — who do, after all, hand out traffic tickets, tell people to "move along," and occasionally make pests of themselves by bossing people about and making people acutely aware of everything they are doing, and everything wrong they have ever done in their lives. But it is one thing for someone to avert his eyes, cross the street, nervously walk in the other direction, or suddenly slow down a car to a speed approaching the speed limit, as a way of avoiding trouble, and Respondent's argument notwithstanding, nobody claims that such actions would justify detaining anybody. Such red herrings should not distract the Court from considering what is truly at issue in this case: the response by a police officer to one who, out of the blue, suddenly bolts from the officer's presence. This action is not one of convenience, nervousness, or unease, but one of panic. And the question at issue in this case is not whether it conclusively establishes the fleeing citizens' guilt, but whether such a panicked reaction, disclosing a self-awareness that the police presence poses a threat of some sort, is worth investigating—or whether the Constitution commands that the police look the other way, and pretend it never happened.

appear to presume a Society in which law enforcement is entirely reactive, unflinchingly credulous, and blissfully naive — and is constitutionally forbidden from being otherwise by the United States Constitution: from the sensible observation that "[f]light is an ambiguous act" and one's "[a]voidance of strangers or the police may stem from motives other than consciousness of guilt," BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, p 7, Respondent reasons that since "both flight and presence in a high crime area are consistent with innocent behavior," they provide no basis for a *Terry*-stop, and that the only appropriate police action is to let the citizen keep running; and the Illinois Supreme Court, having concluded that the right of free association prohibits police from telling people loitering about to "move along," *Chicago* v *Morales*, 177 Ill 2d 440, 459-461; 687 NE2d 53 (1997) *aff'd oth grds* ___ US ___ (No. 97-1121, decided June 10, 1999)[14] reasons because police cannot force citizens to move, they cannot force them to stand still.[15] Both arguments,

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[14]As this Court noted in *Morales*, the problem with the anti-gang ordinance in question was not that it empowered police to instruct citizens to "move along," but that it gave unbridled discretion to the police in determining a citizen's requisite lack of "apparent purpose" to bring them within the reach of the ordinance. Most members of the Court seemed to agreed that a more narrowly drafted ordinance would pass constitutional muster.

[15]This argument strikes *Amicus* as a logical *non sequitur*: just as there is a difference between detaining someone and following him, *California v Hodari D, supra*, *Amicus* perceives a difference between detaining somebody, and watching him run away as fast as his legs can carry him. And the State of Illinois draws no distinction between observing behavior, and drawing an inference from the behavior: the state court's apparent contrary assumption notwithstanding, *Amicus'* research was unable to discover *any* state statute requiring a citizen to stop what he is doing and remain where he is, whenever a police officer appears on the scene; on the other hand, the manner in which the citizen chooses to depart — *eg*, fleeing in panic and confusion, as opposed to taking special care to cross the street *with the light*, so as to avoid a ticket for jaywalking — may say a great deal about what the citizen has been doing in the recent past. *See, eg*, *People* v *Souza*, 9 Cal 4th 224; 36 Cal Rptr 2d 369; 885 P2d 982 (1994).

however, seem premised on the assumption that police must resolve all ambiguities in favor of inaction, and that an individual's interest in Liberty cannot abide any police attention resulting from activities which, though suggesting a consciousness of guilt, provide no corroboration for an inference of wrongdoing. From this premise, it follows that flight alone cannot justify a detention, since flight alone suggests, but does not establish, guilt — and that, absent some other circumstances to confirm the inference of a guilty conscience, police may not view flight at the sight of a police officer as anything more than "the exercise — at top speed — of the person's constitutional right to move on." *People v Wardlow, supra* at 701 NE2d 487, quoting *State* v *Hicks*, 241 Neb 357; 488 NW2d 359, 363 (1992) and *People v Shabaz, supra* at 378 NW2d 460. Accordingly, Respondent argues, where an ambiguous act is consistent with innocent behavior, the police have no grounds to justify a *Terry*-stop. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, p 7; *People v Wardlow, supra*.

Though perhaps not readily apparent, upon reflection the logical implications of Respondent's position are startling: Police activity is, at its core, a necessary evil to be avoided whenever possible, justified only by a *prima facie* showing of citizen misconduct; marginal or ambiguous behavior, while perhaps a source of subjective curiosity, can justify no official action, since the police must resolve all ambiguities, no matter how far-fetched or convoluted, in favor of individual Liberty, rather than the Public Safety; and unless observable conduct confirms an inference of identifiable criminal conduct by an identifiable person, the police — and, as a consequence, the Law — can undertake no action to investigate. This implies that the Law's primary concern will protecting citizens from unwanted interaction with the police,

rather than protecting innocent people from those who would break the Law to do them harm.

The prototype for Respondent's model of the modern law-enforcement officer is, of course, Sgt. Schultz, the sergeant of the guard at Stalag 13. *See*, HOGAN'S HEROES, CBS (1965-1971). Charged with maintaining discipline and order at a German prisoner of war camp during World War II, his characteristic response to anything out of the ordinary — "I see nothing — *noth-thing*!" — is a recurring attempt to avoid trouble for himself through the expedient of denying the evidence of his own eyes and ears: it is, after all, theoretically possible that the routine appearance of inmates at the local *haufbrauhaus*, or the odd assortment of radio equipment, guest stars, and beautiful women that somehow keep appearing at the POW camp is consistent with both German efficiency and order; and while investigating such phenomena might contribute to the successful operation of his camp by uncovering breaches of order and security, it would cause him nothing but grief.

Of course, in the view of at least one student of television, literature, and the Second World War, the reason the character of Sgt. Schultz works is because the inmates are the heroes, fighting against the evil that was Nazi Germany — and Schultz, by ignoring or denying the evidence of his own senses, was helping the forces of Good by rendering Evil comically ineffective. But the comedy would fail if the program depicted an Allied prison camp, where the Germans were the inmates and Schultz' bumbling incompetence was assisting the Nazi effort to enslave the world: in that case, the show would be tragedy, rather than farce — and Schultz would be a pathetic failure, rather than a source of laughter.

Those who prefer that the police emulate Sgt. Schultz, and spend their duty time seeing "nothing — *noth-thing*!", may reveal more than they realize about their vision of Good and Evil in contemporary American society. In any event, if we wish our attempts at keeping the public peace to mirror the efficiency of Stalag 13, this is the model we should adopt.

2.
"...a never-ending battle for Truth, Justice, and the American Way."

Petitioner's view, which *Amicus* shares, sees law enforcement as a positive good in a democratic society: protecting the weak and defenseless from human predators is a core function of any government and, in a democracy, the police are the eyes and ears of the Law. While all power is subject to abuse, the solution is not to eliminate power, and place us at the mercy of the lawless; rather, the solution is for the Law to curb the abuse. Moreover, since Liberty is impossible without Order, *cf*, Rousseau, *supra;* Hobbes, *supra*, the occasional minor inconvenience for the sake of enforcing the Law is a price citizens must pay to live a free society. In this view, those charged with enforcing the Law should be intelligent in the execution of their duties, and alert to any signs of trouble. Police should be trained to spot anything that suggests criminal activity or mischief, and encouraged to take reasonable steps to investigate. In addition, police are admonished to use common sense in all dealings with the public — whether it means using their discretion to admonish, rather than punish, for a minor breach of the peace; or in assessing the degree of risk to public safety posed by action, or inaction, on their part.

Though perhaps not as conducive to pretty rhetoric, Petitioner's logic presents a more optimistic view of Society, and self-government, than that of Respondent: while human beings are capable of great cruelty and evil, they are also capable of kindness, nobility, and hope; and though evil may exist in the world, Society can keep it at bay through the institution of Law. Moreover, in a democratic Society, where Government exists to serve its citizens, those who enforce the Law are public servants, rather than public oppressors; and in a Society which values Liberty as well as law and order, the Law will craft the necessary compromises in order to achieve both. Accordingly, the Law will use common sense to protect freedom, as well as the weak and defenseless; and

courts will have little patience with apologists for criminal behavior, who claim a moral equivalence between clumsy efforts to enforce the Law, and callous attempts to break it.

Modesty, restraint, and an aversion to avoidable ridicule preclude *Amicus* from identifying the precise prototype for this view of law-enforcement officers, except to say that it comports with the idealized self-image of many members of the law enforcement community. However, as the sub-heading for this portion of the argument suggests, the model is somewhat more heroic than Respondent's ideal of Sgt. Schultz. Suffice it to say that in many cases, as here, it involves officers who go about their duties disguised as mild-mannered minions of a great metropolitan police department.

With these differences in outlook in mind, let us turn to the issue at hand:

C.
FLIGHT, SUSPICION, AND REASON

The underlying premise of the Illinois Supreme Court was that a citizen's act of fleeing from the presence of police justifies no legitimate police interest. This accepted as a given, it followed that the "flight alone is insufficient to create a reasonable suspicion of involvement in criminal conduct." *People v Wardlow*, at 701 NE2d 486. However, this Court can return reason to the Fourth Amendment by recognizing the fallacy in the first assumption of the syllogism, and acknowledging that while not justifying an arrest, flight does invite pursuit — and unprovoked flight from the presence of police invites an inquiry into the reason for such odd behavior.

The insight that a guilty conscience can cause one to run from shadows is as old as the Book of Proverbs, 28:1, and as timeless as the wisdom of Juvenal: "This is the first of punishments, that no guilty man is acquitted if judged by

himself."[16] SATIRES, xiii, 2. It was conscience that proved the undoing of the protagonist in *The Tell-Tale Heart*; and it was Dostoyevsky's realization that torment over one's own misdeeds can exact a heavier burden than the Law that breathed life into *Crime and Punishment*. Flight is, by its nature, an instinctive act of self-preservation that seeks to remove the actor from the presence of a perceived threat;[17] and if a citizen bolts in unprovoked flight at the sight of the police,[18] it is not unreasonable to infer that the action stems from a guilty conscience. *California v Hodari D, supra* at 499 US 623 n 1; *Michigan v Chestermut, supra* at 100 L ed 2d 574 (Kennedy, J, concurring). Courts do not, after all, hold police to impossible standards of prescience or precision, nor require them to form in their own minds the precise legal rationale that hindsight shows the circumstances justify, in order to render their conduct "reasonable" under the Fourth Amendment. *Scott* v *United States*, 436 US 128, 138 (1978); *People* v *Arterberry*, 431 Mich 381; 429 NW2d 574 (1988). And as flight is a sufficiently odd response to the appearance of police to warrant a reasonably prudent officer in concluding that "criminal activity may be afoot," it

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[16] *Amicus* notes that Juvenal was speaking of psychological punishment and honest self-judgment, rather than advocating the wide-scale restructuring of Roman legal institutions.

[17] *Cf*, Shakespeare, HENRY IV, PART I, V, iv, 120 (Noting that "[t]he better part of valor is discretion"); *see also*, Cleese, Idle, *et al*, M. PYTHON AND THE HOLY GRAIL, (1975), "Ballad of Brave, Brave, Brave Sir Robin, the Not-Quite-so-Brave-as-Sir-Lancelot":

"When danger reared its ugly head,
"He bravely turned his tail and fled...."

[18] Police could not, of course, provoke a citizen to flee — for instance, by threats of harassment or physical harm — and then use his subsequent efforts to avoid trouble as an excuse to detain him. Under those circumstances, however, the citizen's "flight" is readily understandable — and unreasonable police conduct in *provoking* one to flee could well render any subsequent seizure and detention unreasonable.

supplies the "articulable suspicion" necessary to warrant a further inquiry, *Terry v Ohio, supra* at 21-22, 30; *State* v *Anderson*, 155 Wis 2d 77, 84-85; 454 NW2d 763, 765-766 (1990), giving officers ample grounds to detain the fleer long enough to discover the cause of his flight.[19] *California v Hodari D, supra* at 499 US 623 n 1; *Michigan v Chesternut, supra* at 100 L Ed 2d 574 (Kennedy, J, concurring). *See also, State v Anderson, supra*; *Platt* v *State*, 589 NE2d 222, 226-227 (Ind, 1992).

Courts considering the implications of flight[20] largely

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[19]Actually, in *Sibron* v *New York*, 392 US 40, 66-67 (1968), this Court noted that "deliberately furtive actions and flight at the approach of strangers of the police are strong indicia of mens rea...." Therefore, the *Sibron* Court held, "when coupled with specific knowledge...relating the suspect to the evidence of crime," they could justify an arrest upon probable cause. Simple logic would seem to hold that if flight (*mens rea)* + specific evidence of a crime = probable cause, then evidence of flight would suffice for "articulable suspicion." And this appears to be the position of Professor LaFave. LaFave, 4 SEARCH AND SEIZURE (3D ED), §9.4(f), p 181-182 (1996).

[20]Jurisdictions holding mere flight to be insufficient to justify police interest all appear to view flight upon the approach of the police as "simply...the exercise — at top speed — of the person's constitutional right to move on." *See, eg, State* v *Hicks*, 241 Neb 357, 363; 488 NW2d 359, 364 (1992); *People v Shabaz, supra* at 378 NW2d 460; *People v Wardlow, supra* at 701 NE2d 487. This appears to overlook the importance of context in assessing one's behavior: those who bolt from police presence in one context — at the starting line of a 10 kilometer run, for example — suggest one thing by their actions; those who bolt from an officer's presence in another context, such as a dark street at 3:00 am, *see, People v Souza, supra,* or without a discernible reason, *State v Anderson, supra*, may suggest something quite different. But jurisdictions which scoff at the proverbial common sense of PROVERBS, 28:1 not only deprive the police of the ability to use common sense: they also appear to ignore the fact that time and again, events proved the officers' suspicions to be correct. *See, eg, Hicks, supra; Shabaz, supra, Wardlow, supra. See also, People* v *Talbot*, 792 P2d 489 (Utah App, 1990); *People* v *Holmes*, 81 NY2d 1056; 619 NE2d 396 (1993).

While *Amicus* does not claim that hindsight alone can excuse an

concur: drawing upon the anticipated reaction of drug dealers to the approach of police, for example, the Connecticut Court of Appeals held that police action in seizing those fleeing through the rear of a restaurant, when other officers approached the scene of reported, though unobservable, drug activity from the front, constituted a *Terry*-stop on reasonable, articulable suspicion, *State* v *Williamson*, 10 Conn App 532; 524 A2d 655, 659-660 (Conn App, 1987). The Indiana Supreme Court, recognizing that "suspicious conduct by its very nature is ambiguous," observed that "[f]light at the sight of police is undeniably suspicious behavior," and therefore approved the investigative detention of a motorist who fled from the scene in great haste, when a police car pulled up behind his parked vehicle. *Platt* v *State*, 589 NE2d 222, 225-227 (Ind, 1992). Similarly, the Sixth Circuit has noted that "[f]light invites pursuit," and that flight "from a clearly identified law enforcement officer may furnish sufficient ground for a limited investigative stop," *United States* v *Pope*, 561 F2d 663, 668-669 (CA 6, 1977); *see also, United States* v *Lane*, 909 F2d 895 (CA 6, 1990), and most other Circuits concur. *See, eg, United States* v *Rundel*, 461 F2d 860 (CA 3, 1972); *United States* v *Haye*, 825 F2d 32 (CA 4, 1987); *United States* v *Vasquez*, 534 F2d 1142 (CA 5, 1976); *United States* v *Cardona-Rivera*, 904 F2d 1149)CA 7, 1990); *United States* v *Jackson*, 741 F2d 223 (CA 8, 1984).

Perhaps the best treatment of the issue, however, comes from the Wisconsin Supreme Court decision in *State v Anderson, supra*: in that case, as here, the fled at the approach of identifiable police cars, and police pursued him to determine the cause of his flight. Noting that the critical

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unreasonable action, the consistency with which those who bolt from the presence of the police turn out to be engaged in criminal misconduct might strike an objective observer as reason enough for second thoughts about the wisdom of the *Shabaz* view of the neutral implications of panicked flight.

Fourth Amendment question turned on the reasonableness of police conduct under the facts and circumstances confronting them, the court reasoned that since "reasonableness is a common sense test," the appropriate question was not whether the circumstances were amenable to differing interpretations, but rather "what is reasonable under the circumstances" — or, more specifically: "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v Anderson*, at 454 NW2d 765. In this view, the relevant concern was not certainty, but ambiguity — and resolving that ambiguity was the whole point of an investigative detention under *Terry*:

> "[P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop....[S]uspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences...the officers have the right to temporarily detain the individual for purposes of inquiry.
>
> "Flight at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, it would have been poor police work indeed for an officer to have failed to investigate this behavior further." *State v Anderson*, at 454 NW2d 766 (Citations omitted).

The legal construction of "reasonableness" which the Illinois Supreme Court places upon the Fourth Amendment needlessly constricts the ability of police officers to note and draw inferences from the reaction of those around them, and rejects a wisdom that reaches back into Antiquity, *see*, PROVERBS, 28:1, teaching us that the panic stemming from a guilty conscience induces flight — or other, similarly odd behavior[21] — even when there is no danger. This holding is inconsistent with the application of reason to human interaction, and ignores the common sense that each of us bring to our lives every day; even worse, such a view of the Fourth Amendment would carve this misguided, stubbornly obtuse view of human nature into stone.

Granted that courts are final arbiter of what is "reasonable" under our Constitution, *Amicus* submits that courts should be careful not to intrude too far into areas beyond their experience or expertise.[22] It is, after all, the police, and not the courts, who deal with crime and criminals on a daily basis; and it is the police, not the courts, who are ultimately charged with keeping our streets safe, and our property secure. Therefore, except under extreme circumstances, courts should respect their experience in determining what actions are necessary or useful to maintain

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[21]In point of fact, there will be many factors a well-trained police officer will notice, in assessing what is going on around him — including the reactions of others to his own presence or appearance on the scene. *See, eg*, Tiffany, McIntyre, and Rottenberg, DETECTION OF CRIME (1967). *See also*, LaFave, *supra* at §9.4(f), pp 176ff.

[22]As one authority has noted: "Law teachers apart, judges should perhaps be the last to lay claim to any special knowledge of the workings of ordinary human nature." Wise, *Criminal Law & Procedure: 1974 Annual Survey of Michigan Law*, 21 WAYNE L REV 401, 424 (1975).

law and order on streets, and to ensure that the rule of Law, rather than that of the Jungle, prevails in our society. US CONST, Art III.

Accordingly, the Illinois Supreme Court holding below is based upon flawed reading of the Fourth Amendment, and cannot provide a basis for suppressing evidence in this case.

D.

CONCLUSION

It appears consistent with both the purpose and scope of the Fourth Amendment to hold that one's unprovoked flight from the presence of police provides the justification for a second-tier encounter under this Court's decisions in *Terry v Ohio*, and *Florida v Royer*. *Cf, California v Hodari D*, at 623 n 1; *Michigan v Chesternut*, (Kennedy, J., concurring). While not unlawful, at the very least such a reaction suggests an actor who regards the Law as a threat, and is therefore inherently suspicious. *State v Anderson, supra*; *Platt v State, supra*. While even one with nothing to hide may feel uncomfortable at the official attention, the Constitution does not guarantee that law enforcement will be faceless; and, until now, courts have refrained from construing our Constitution in such a way as to discourage police from venturing out onto the streets, for fear of upsetting those with fragile nerves.

Amicus submits that the mere presence of police is a reassurance to those for whom the Law is a protector, rather than an adversary; the only one to whom such a presence is a threat is one with guilty conscience — and an objective manifestation of that guilty conscience provides police with sufficient grounds to investigate. The contrary rule, requiring police to look away and pretend they saw nothing, not only forces them to ignore the evidence of their senses, but also teaches them to suppress the protective instincts that a good policeman needs to execute his duty. Such an outcome is inconsistent with the function of the police in a democratic society, in that forbidding an officer from discovering what is going on within the range of his own senses severs the Law from its own eyes and ears. More importantly, by

demonstrating the Law's inability or unwillingness to keep attuned to the nuances of daily life, it subverts the very purpose of the Law for the sake of rhetoric, disheartening those who look to the Law for protection, encouraging those for whom the Law is an enemy.

Courts have recognized the need to maintain the confidence and respect of the public, and avoid "subject[ing] an already much maligned system to further ridicule." *People v Moore*, 432 Mich 311, 325-326; 439 NW2d 684 (1989). The need to correct the holding of the lower court should therefore be apparent: Such a decision not only conflicts with common sense, common perceptions, and common experience, but is also dangerous to public safety, positively destructive of public order, and likely to make the public even more despairing of the ability of our democratic institutions to make democracy work — a system of governance which requires a Government able to enforce a rule of law, impose some measure of civility on life, and assure the safety and security needed for freedom to flourish and law-abiding citizens to prosper. *Amicus* submits that any regime that forbids the use of insights into ordinary human nature weakens the ability of Government to protect its citizens from harm — and without confidence in the ability of Government to fulfill this basic function, our dreams of ordered liberty would crumble to dust, like withered parchment. *Cf*, US CONST, Preamble; *Leviathan, supra; The Social Contract, supra*.

The Constitution does not forbid reasonable actions to enforce the Law or maintain public peace, and no Legislative enactment limits the power of police to chase after people who bolt from their presence. As the Constitution grants courts no legislative power, US CONST, Art III, 1-2, judges may not adopt such a rule as a matter of policy. Thus, absent

circumstances which readily explain the action,[23] one who bolts at the sight of police has no reason to complain when they begin wondering about the matter, nor fault them for trying to determine why their mere presence would strike someone as a threat.

Accordingly, the lower court decision in this case is in error, and this Court should reverse.

RELIEF

WHEREFORE, this Court should reverse the holding of the Illinois Supreme Court.

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Dated: June 21, 1999
JC/eb

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[23] *Amicus* notes that, under the "totality of circumstances," *cf. United States v Sokolow*, at 7-8, the explanation for some such actions might be self-evident: the presence of fully-armed riot police, for example, are *intended* to make people disperse, as quickly as possible; and the sudden appearance of a host of squad cars, accompanied by armed officers clad in flak-jackets could well induce many prudent, law-abiding citizens to run for cover at flank speed.

On the other hand, the most likely explanation why a citizen would bolt from the mere presence of an officer is the citizen's own guilty conscience.

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No. 98-1036

IN THE

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

SAM WARDLOW, A.K.A. WILLIAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does unprovoked flight from a uniformed police officer justify a stop under *Terry* v. *Ohio*?

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IN THE

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

SAM WARDLOW, A.K.A. WILLIAM WARDLOW,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The investigative stop and frisk is a mainstay of modern policing. It allows the police to react quickly to suspicious behavior, often preventing crimes before they are committed. *Terry* v. *Ohio*, 392 U. S. 1 (1968) recognizes the importance of

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

this technique by subjecting stops to the deferential reasonable suspicion standard. The decision of the Illinois Supreme Court that flight from uniformed police does not justify a *Terry* stop is contrary to this Court's deference to police on the street. The Illinois decision, if upheld, will cloud the *Terry* standard and straitjacket police confronted with clearly suspicious conduct. This is contrary to the interests of justice and society that CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On September 9, 1995, Officer Timothy Nolan and his partner were part of a "caravan" of Chicago police cars investigating narcotics sales around West Van Buren Street. *People* v. *Wardlow*, 701 N. E. 2d 484, 485 (Ill. 1998). The caravan consisted of eight officers in four cars, with Nolan's car in he rear. *Ibid.* At the suppression hearing, Nolan testified that he wore his uniform that day, but he could not recall whether his car was marked. *Ibid.*

Nolan, the driver, observed defendant in front of 4035 West Van Buren. *Ibid.* Defendant "looked in the officers' direction and then fled." Nolan drove south toward Congress Avenue, observing defendant, who had fled south through a gangway and an alley. Defendant was carrying a white opaque bag under his arm. He was cornered near 4036 West Congress when he ran right towards Officer Nolan's car. *Ibid.*

Officer Nolan stopped defendant and immediately conducted a pat-down search. Since he could not see what was inside the bag, Officer Nolan squeezed it "and felt a very heavy, hard object 'that had a similar shape to a revolver or a gun.' " *Ibid.* Believing this to be a weapon, Officer Nolan opened the bag, finding a .38 caliber pistol containing five live rounds. Nolan then arrested defendant. *Ibid.* Although there is no direct evidence of the exact time of the encounter, the arrest report was filed at 12:15 p.m. See *id.*, at 485, n. 1.

Defendant was convicted of unlawful use of a weapon by a felon. *Id.*, at 484. The Illinois Court of Appeal reversed the conviction, finding the handgun was the fruit of an improper stop. *Ibid.* The Illinois Supreme Court affirmed, holding that defendant's flight did not justify a stop under *Terry* v. *Ohio*, 392 U. S. 1 (1968). *Wardlow*, 701 N. E. 2d, at 487, 489.

SUMMARY OF ARGUMENT

The present case turns on an appropriate understanding of *Terry* v. *Ohio*, 392 U. S. 1 (1968). *Terry* is a pragmatic decision that helps fit Fourth Amendment principles to modern times. It balances an acute awareness of the investigative needs of police and society with the legitimate need to be free from police harassment.

Although this Court has never determined whether flight from the police justifies a *Terry* stop, its interpretation of *Terry* shows a pattern of deference to limited police intrusions so long as some level of objective suspicion exists. *Terry* and its progeny do not affix some mathematically precise level of suspicion for a proper stop. Instead, reasonable suspicion requires no more than a minimal, objective suspicion of criminality. That suspicion can be supported by evidence that has both innocent and suspicious explanations. So long as the level of suspicion is beyond a "mere curiosity, rumor, or hunch," *Terry* is satisfied.

Unprovoked flight from a police officer justifies a *Terry* stop. Flight supports reasonable suspicion because of the close relationship between flight from authority and a guilty mind. This Court has found flight as evidence of a guilty mind in a variety of contexts, finding it to strongly support probable cause, and admissible at trial as evidence supporting an inference of guilt. This position finds support from a wide variety of other sources, including respected judges and legal commentators. Fleeing from a visible police presence thus raises the type of question which *Terry* allows officers to investigate.

The right to avoid contact with the police does not negate reasonable suspicion. The fact that flight has innocent, as well as suspicious, explanations does not alleviate the reasonable suspicion; *Terry* can be satisfied by ambiguously suspicious conduct. There are many innocent ways to avoid contact with the police. By fleeing, defendant indicated to police officers that he had a guilty mind, which is worthy of investigation. Had he simply walked away or refused to talk to the officers, there would have been no grounds for a *Terry* stop.

Unprovoked flight from police not only justifies the stop in the present case, but also supports a *Terry* stop in any circumstance. Flight from police is suspicious without regard to time or place. As flight is suspicious under virtually any conceivable context, flight alone should support reasonable suspicion.

Although this Court usually avoids promulgating bright-line rules in Fourth Amendment cases, it will do so under the appropriate circumstances. The relationship between flight from police and *Terry* is this type of situation. Because flight will justify a *Terry* stop under almost any set of facts, little will be lost and much will be gained by a rule recognizing flight's importance in all situations.

ARGUMENT

The investigative stop and frisk sanctioned by *Terry* v. *Ohio*, 392 U. S. 1 (1968) embodies the reasonableness that forms the core of the Fourth Amendment. Police should not have to wait for probable cause before every intrusion into privacy. Some street encounters warrant some intrusion short of arrest and search. By allowing officers to investigate merely suspicious behavior, as opposed to the more clearly illicit behavior needed to support probable cause, *Terry* stops can prevent crimes before they are completed. This was the case in *Terry*, which involved several armed individuals casing a store window for what might have been an armed robbery. See *id.*, at 5-6. *Terry* accomplishes this while still protecting privacy

through its reasonable suspicion standard and the limited intrusion it sanctions. As one of our most prominent state court judges noted, anticipating *Terry*, the stop and frisk is a worthy compromise between public safety and individual rights.

> "It might be possible . . . to lessen the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it, even though not tantamount to probable cause for arrest. Such a minor interference with personal liberty would touch the right to privacy only to serve it well." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 333-334.

As a proper analysis of the *Terry* standard and its relationship to flight from uniformed police will show, the Illinois Supreme Court upset *Terry*'s compromise by suppressing the evidence in this case.

I. The reasonable suspicion standard is primarily intended to prevent harassing stops based upon no more than curiosity, rumor, or hunch.

In deciding whether flight from a visible police presence justifies a stop under *Terry* v. *Ohio*, 392 U. S. 1 (1968), this case must be grounded in a thorough understanding of *Terry*'s reasonable suspicion standard. Unfortunately, this term is an "elusive concept" that by itself does not guide courts, counsel, or officers through the "myriad factual situations" found in street encounters between officers and citizens. See *United States* v. *Cortez*, 449 U. S. 411, 417 (1981). A careful reading of *Terry* and its progeny reveals an underlying policy of accommodating society's critical interest in investigation while limiting police harassment. Proper analysis of any set of facts under the reasonable suspicion requirement will adhere to these principles.

A. The Terry Standard.

When this Court applied the exclusionary rule to the states in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the power of the exclusionary rule was dramatically increased, influencing virtually every criminal prosecution in this country. Expanding the exclusionary rule put this Court's Fourth Amendment jurisprudence under increasing strain. An amendment that arose from the abuses of English customs officials, see 1 W. LaFave, Search and Seizure § 1.1(a), p. 4 (3d ed. 1996), now had to deal with the core functions of modern American police work. These difficulties were compounded by the text of the Fourth Amendment,[2] which "has 'both the virtue of brevity and the vice of ambiguity,' " *id.*, at 5, making it difficult to interpret. The many problems of dealing with the Fourth Amendment in modern society eventually found their way to this Court.

Terry is a pragmatic decision that helped fit Fourth Amendment jurisprudence to modern times. *Terry* involved one of the most common and important parts of police work, a "confrontation on the street between the citizen and the policeman investigating suspicious circumstances." 392 U. S., at 4. Cleveland Police Detective Martin McFadden, a veteran of 39 years of police work, observed Terry and two other people engaging in what appeared to McFadden to be " 'casing a job, a stick-up.' " *Id.*, at 6. Believing this was a time for action, Officer McFadden approached the men, identified himself as a police officer, and asked them for their names. After receiving an inaudible response, Officer McFadden grabbed Terry, spun him around, and patted him down. He eventually found a pistol on Terry's person. *Id.*, at 6-7.

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2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amdt. 4.

This Court found that Officer McFadden's investigation did not violate the Fourth Amendment. While defendant had Fourth Amendment interests in his stop and search, *id.*, at 9, the *Terry* Court understood that police had a great stake in protecting the legality of the "stop and frisk." *Id.*, at 10. The interests of the public in successful law enforcement, when combined with the relatively less intrusive nature of a stop and frisk, convinced the *Terry* Court to accept the legitimacy of the stop and frisk.

The proponents of the stop and frisk "argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Id.*, at 10. According to its proponents, there is a difference between a "stop" and a "seizure" and a "frisk" and a "search." These differences would allow an officer to make the less intrusive stop and frisk with less than probable cause. See *ibid.* The opponents of the stop and frisk would apply one standard to all police activities. "The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution." *Id.*, at 11. They urged that approval of the stop and frisk "would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers . . . . " *Id.*, at 12.

The *Terry* Court approached this case "mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." *Ibid.* It also recognized that the thrust of the exclusionary rule is deterring unlawful conduct by the police. *Ibid.* Because there would be times when the exclusion of evidence would not deter police conduct, courts had to be sensitive to when their sanctions against the police would be futile. See *id.*, at 14. Given the great diversity of street

encounters between police and citizens, see *id.*, at 13, "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.*, at 15.

The practical bent of the *Terry* Court extended to its analysis of the particular facts in the case. It recognized that it would be impractical to hold the stop and frisk to the requirements of the Warrant Clause, as it involved "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.*, at 20. Instead, the Court simply looked to the reasonableness of Officer McFadden's actions. Using the test found in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), it balanced the need for the stop and frisk against the invasion of privacy entailed by these acts. *Terry*, *supra*, 392 U. S., at 21.

The assessment of the government interests shows the central theme of this opinion. The most important justification for Officer McFadden's decision to approach defendant and his companions was that this decision was part of the core of police work—"effective crime prevention and detection." *Id.*, at 22. If Officer McFadden was to do his job properly, he had to be allowed to stop and investigate individuals acting in a manner such as Terry. "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." *Id.*, at 23. The need to let police do their jobs is also reflected in the *Terry* Court's recognition of the police officer's need to make sudden decisions. See *id.*, at 20. *Terry* recognizes that the exclusionary rule "cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." *Id.*, at 13. Finally, the *Terry* Court justified the frisk of defendant for practical reasons. The Court recognized that police work can be dangerous, and there are

many times when an officer must be allowed to pat down a suspect so that he may do his job safely. See *id.*, at 23-24.

The *Terry* Court did not leave police officers with unfettered discretion. To justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.*, at 21. The Court sought to prevent officers from using the stop and frisk as a license to harass or otherwise annoy "outside the legitimate investigative sphere." *Id.*, at 15. While the exclusionary rule could not prevent "[t]he wholesale harassment by certain elements of the police community of certain minority groups," *id.*, at 14, *Terry* did not give officers license to harass. "Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Id.*, at 15. So long as an officer has some "specific and articulable facts" supporting the stop, see *id.*, at 21, the threat of harassment is sufficiently abated to satisfy the Fourth Amendment.

Given the balance of government and citizen interests, these facts and inferences did not have to constitute probable cause, but only had to "reasonably warrant that intrusion." *Ibid.* This is not an evidentiary Everest. "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than *inarticulate hunches* . . . ." *Id.*, at 22 (emphasis added). Thus a balance is struck between two absolutes. The *Terry* Court avoids treating street encounters like searches of dwellings. To do so would stifle police activity on the streets through the overly formal warrant procedure. See *id.*, at 20. "Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Ibid.* At the same time, the decision does not give police unfettered discretion to stop people on the streets. By requiring the officer to have specific justification for the stop and frisk, the *Terry* Court brings these encounters into the mainstream of Fourth Amendment law, see

id., at 21, n. 18, while recognizing the many practical difficulties encountered by police operating on the streets.

B. Terry's Progeny.

While this Court has never determined whether flight from police by itself justifies a *Terry* stop, its interpretations of *Terry* show a pattern of deference to limited police intrusions so long as some objective ground for suspicion exists. If the justification given for the intrusion acts to limit police discretion, this Court has deferred to the needs of police to respond to imminent criminal activity without the fear of judicial second-guessing.

1. Supporting the officer.

Since *Terry*, this Court has steadily supported the authority of police officers to conduct various stops and frisks without the threat of undue judicial interference. One notable example is found in *United States* v. *Cortez*, 449 U. S. 411 (1981). *Cortez* involved an investigative stop of a vehicle made after Border Patrol officers deduced, by observing various footprints at a border crossing, that groups of illegal aliens were being led across the border on foot and then transported further via vehicle. The officers used this deduction and their knowledge that certain types of vehicles are used to carry illegal aliens to stop defendant's vehicle. After conducting an immigration check, agents found six illegal aliens hiding in defendant's camper. *Id.*, at 413-416.

The *Cortez* Court recognized that under *Terry* and other cases, this investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.*, at 417. There were two criteria for making this decision. "First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.*, at

418. These data then allow officers to make inferences or deductions that an average person might be incapable of reaching. *Ibid.* "The second element . . . is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Ibid.*

The two requirements do not straitjacket the police. Behind the *Cortez* decision was the realization that this "process does not deal with hard certainties, but with probabilities." *Ibid.* The officers' privilege to draw conclusions from a certain set of circumstances simply reflects what had long been common practice. "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same — and so are law enforcement officers." *Ibid.* Thus, the evidence collected and conclusions drawn "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Ibid.*

When viewed from this perspective, the action of the Border Patrol became readily acceptable. The *Cortez* Court reviewed each of the Border Patrol's observations and deductions and found the whole logical chain flawless. *Id.*, at 419-421. "We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement." *Id.*, at 419.

The need for police to be able to do their jobs is recognized in other post-*Terry* cases. In *Adams* v. *Williams*, 407 U. S. 143 (1972), Police Sergeant John Connally was driving alone on patrol duty when a person known to the sergeant approached the car and told him that a person seated in a nearby car was carrying narcotics and had a gun at his waist. *Id.*, at 144-145. After calling for assistance, Sergeant Connally approached the vehicle and asked the occupant to leave the car. When the occupant rolled down the window, Sergeant Connally reached into the car to where he thought a gun would be, and took a loaded revolver from defendant's waistband. *Id.*, at 145. In

upholding this stop and frisk, the *Adams* Court emphasized the need to allow police to do their jobs.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry recognizes that it may be the essence of good police work to adopt an intermediate response.*" *Ibid.* (emphasis added).

Part of an officer's job is ensuring his own safety while conducting his duties. Thus, an officer making a *Terry* stop "should not be denied the opportunity to protect himself from attack by a hostile suspect." *Id.*, at 146. Therefore, as Sergeant Connally properly responded to an informant's tip that the suspect was armed, he could search defendant for the weapon he suspected defendant of possessing. *Id.*, at 147-148.

Terry's basis in common sense has allowed this Court to apply it to situations beyond those which first brought about the ruling. *Terry* initially dealt with street encounters where a police officer believed a crime was about to take place. *Terry*, *supra*, 392 U. S., at 30. Since then, *Terry* has been applied to Border Patrol checkpoints, *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 566-567 (1976), automobile stops, *Cortez*, *supra*, 449 U. S., at 417, and "sniff tests" of airport luggage. *United States* v. *Place*, 462 U. S. 696, 702 (1983). *Terry* has been expanded to include investigation of crimes that have already been completed. *United States* v. *Hensley*, 469 U. S. 221, 229 (1985). The post-*Terry* decisions have also recognized that *Terry* is not just a method for allowing a law enforcement officer to protect himself. A general interest in law enforcement can be enough to justify a *Terry* stop. See *Place*, 462 U. S., at 703-704. The many different uses of *Terry* reiterates the practical essence of this decision.

2. Appropriate limits.

Terry does not, however, present police officials with a blank check. An officer can only stop a person after developing an articulable suspicion supported by facts that the person may be involved in some suspicious activity. See *Terry*, *supra*, 392 U. S., at 21. This is intended to prevent an officer from making *Terry* stops with unfettered discretion.

Time and again the cases in which this Court has invalidated *Terry* stops turned on whether an officer's justification for the stop sufficiently limited his discretion. Thus, in *Brown* v. *Texas*, 443 U. S. 47 (1979), this Court castigated the police for making a stop for the sole reason that the suspect looked suspicious. *Id.*, at 52. The primary reason behind the reversal was to limit the discretion of police officers. "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions *solely at the unfettered discretion of the officers in the field.*" *Id.*, at 51 (emphasis added).

Another example of conduct exceeding the limits of *Terry* is found in *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975). Here, Border Patrol agents operating a roving patrol for illegal immigrants stopped a car near the Mexican border with no justification except that the vehicle's occupants appeared to be of Mexican descent. *Id.*, at 875. The Court rejected this as the sole justification for a *Terry* stop, as it placed too much discretion in the hands of Border Patrol officials.

> "In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. . . . To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, *solely*

at the discretion of Border Patrol officers." *Id.*, at 882 (emphasis added).

Although it is clear that *Terry*'s reasonable suspicion standard is intended to prevent the harassment associated with unfettered discretion, the exact limit the standard places on police is less clear. It is not a " 'finely-tuned standard[],' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 235 (1983)). Reasonable suspicion and probable cause are instead "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Ibid.*

3. Innocence and suspicion.

This Court has established some guidelines broader than the particular facts of the case. The information supporting reasonable suspicion need not solely point to the suspect's criminality; evidence that has both illicit and innocent explanations may support reasonable suspicion. *United States* v. *Sokolow*, 490 U. S. 1, 8-10 (1989) (paying for expensive airline tickets with cash, combined with other factors).

The type of proof demanded by the reasonable suspicion standard allows it to be supported by such ambiguous evidence. Instead of some quantum of proof such as the reasonable doubt or preponderance standards, the reasonable suspicion standard "requires some '*minimal* level of objective justification' for making the stop." *Id.*, at 7 (emphasis added) (quoting *INS* v. *Delgado*, 466 U. S. 210, 217 (1984)). "That level of suspicion that is considerably less than proof of wrongdoing by a preponderance of the evidence." *Ibid.*

Rather than the level of proof, reasonable suspicion is concerned with finding some specific objective fact or facts supporting an inference of criminality. Objectivity is the hallmark of the Fourth Amendment, a fact noted by the *Terry* Court. See *Terry*, *supra*, 392 U. S., at 21, n. 18. By being

objective and centered on the detainee's potential criminality, reasonable suspicion helps to prevent the harassment that was the central concern of the *Terry* Court, while its "minimal" level of suspicion allows police to investigate suspicious activity without fear of undue judicial interference.

In re Tony C., 21 Cal. 3d 888, 582 P. 2d 957 (1978) demonstrates this point. The California Supreme Court first provides an excellent summary of what *Terry* requires:

> "[T]he courts have concluded that in order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question." *Id.*, at 893, 582 P. 2d, at 959 (citation and footnote omitted).

This decision then gives further substance to reasonable suspicion when it rejects the notion that only unambiguously suspicious behavior supports a *Terry* stop. "Indeed, the principal function of [the officer's] investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal . . . ." *Id.*, at 894, 585 P. 2d, at 960. This reinforces *Terry*'s role as an investigative tool. A decision so closely tied to the core of police work requires a deferential standard. That standard is defined by what *Terry* seeks to prevent.

> "The citizen's undoubted interest in freedom from abuse of this procedure is protected—so far as it is within the law's power to do so—by the correlative rule that no stop or detention is permissible when the circumstances are not

reasonably 'consistent with criminal activity' and the investigation is therefore based on mere curiosity, rumor, or hunch." *Ibid.*

Therefore, reasonable suspicion is satisfied by no more evidence than that necessary to raise the officer's suspicion beyond "mere curiosity, rumor, or hunch." What matters is not the level of suspicion, but the existence of some articulable fact and an objectively reasonable, but minimal, inference of possible criminality. So long as there is some suspicion beyond the level of a hunch or rumor then the threat of harassment is averted, and *Terry* is satisfied.

Terry was decided with the recognition that the police encounter many difficult situations when working in the field. The needs of the police and the rights of individuals are balanced by allowing relatively unintrusive stops and frisks so long as some legitimate law enforcement goal justifies the intrusion. The only requirement is that the officer have some reasonable suspicion that the suspect is engaged in some suspicious activity. *Terry* is a practical case and it should be used in a practical manner. So long as the officer's discretion is sufficiently limited and the purpose of his actions are properly related to legitimate law enforcement goals, courts should not second-guess decisions made by officers in the field.

II. Unprovoked flight from a police officer justifies a *Terry* stop.

This case represents a common problem. An individual spots a police officer and flees. The officer must decide whether to pursue and find out the reason behind the flight, or allow the individual to escape. Before examining flight's justification for a *Terry* stop, it is important to understand what is not present in this case. Defendant did not flee from an undercover officer. Although it is uncertain whether Officer Nolan's car was marked, he was in uniform, and defendant fled after looking in his direction. *People* v. *Wardlow*, 701 N. E. 2d

484, 485 (Ill. 1998). Since the arrest report was filed at 12:15 p.m. it is reasonable to conclude that this encounter took place during daylight, reinforcing the conclusion that defendant's flight was caused by the presence of the police.

It is equally important to remember that defendant's decision to flee was his own. If an officer tries to scare someone into fleeing, the flight is no longer suspicious, and the attempt to provoke the flight is unconstitutional. See Hobson, *Flight and Terry: Providing the Necessary Bright Line*, 3 Md. J. Contemp. Legal Issues 119, 150 (1992).

Defendant's unprovoked flight from a known police officer provided reasonable suspicion for his *Terry* stop. As this type of flight is inherently suspicious regardless of other factual contexts, it should always satisfy *Terry*'s reasonable suspicion standard.

A. Flight and Suspicion.

Flight from a police officer justifies a *Terry* stop because of the close relationship between flight from authority and a guilty mind. In *California* v. *Hodari D.*, 499 U. S. 621, 623 (1991), this Court confronted a *Terry* stop involving flight. Because the argument that the stop was justified had not been preserved in the court below, the *Hodari* Court did not reach this issue. See *id.*, at 623, n. 1. Even so, the *Hodari* Court understood flight's potential relevance to a *Terry* stop. "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ('The wicked flee when no man pursueth')." *Ibid.*

This Court has long recognized that flight is evidence of a guilty mind. In *Sibron* v. *New York*, 392 U. S. 40 (1968), an off-duty police officer surprised two men who were acting furtively in his apartment building's hallway. *Id.*, at 48. Upon seeing him, they fled, and he pursued. He caught, arrested, and searched one of the suspects. *Id.*, at 48-49.

The search was upheld as incident to a lawful arrest. *Id.*, at 66. Defendant's flight was a major factor in the probable cause determination. *Id.*, at 66-67. While the *Sibron* Court relied on several factors in addition to flight to justify the arrest, this does not mean that flight alone cannot justify a *Terry* stop. The *Sibron* Court used these factors to find probable cause to make an arrest. *Ibid.* A *Terry* stop is less intrusive than an arrest, however, and thus requires a smaller quantum of evidence than probable cause. See *Terry* v. *Ohio*, 392 U. S. 1, 26 (1968). Given the different requirements for an arrest and *Terry* stop, it would not be inconsistent with *Sibron* to allow flight to justify a *Terry* stop. In *Sibron*, flight was one of the several factors that combined to give overwhelming probable cause to arrest. It was clearly among the most important factors, being one of the two "strong indicia of mens rea" cited by the *Sibron* Court, see 392 U. S., at 66, demonstrating the importance of this type of evidence.[3] *Sibron*'s use of flight is consistent with the approach of Learned Hand, who found flight strongly supportive of probable cause to arrest in *United States* v. *Heitner*, 149 F. 2d 105, 106-107 (CA2 1945). As Judge Hand noted, regardless of any criticism leveled at flight, "it has at no time been doubted that flight is a circumstance from which a court or

3. This Court's dismissal of flight as justification for probable cause in *Wong Sun* v. *United States*, 371 U. S. 471, 483-484, n. 10 (1963) must be read in light of *Hodari D.* and flight's benign treatment in *Hodari D.* and *Sibron*. As *Wong Sun* was a probable cause case, see *id.*, at 479, its rejection of flight alone is not controlling in this case.

The facts surrounding defendant's flight in *Wong Sun* further distinguish it from the present case. *Wong Sun*'s actual holding was based on the officer's failure to identify himself with the requisite clarity. The narcotics agent "affirmatively misrepresented his mission at the outset . . . . [a]nd before [the suspect] fled, the officer never adequately dispelled the misimpression engendered by his own ruse." *Id.*, at 482-483. Therefore, the flight expressed no more than "a natural desire to repel an apparently unauthorized intrusion." *Id.*, at 483. This does not govern the unprovoked flight from a uniformed officer found in the present case, see *supra*, at 16, and any general condemnation of flight in footnote 10 of *Wong Sun* is pure dictum.

officer may infer what everyone in daily life inevitably would infer." *Ibid.*

Another example of flight's probative value is the use of defendant's flight from the scene of the crime or the jurisdiction against him at trial. A court may instruct the jury that it may consider defendant's flight against him unless he provides an explanation because "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen v. United States*, 164 U. S. 492, 499 (1896). While flight from a crime scene does not create a presumption of guilt, and can have innocent explanations, see *Alberty* v. *United States*, 162 U. S. 499, 510 (1896),[4] this fact does not disqualify flight alone as a basis for reasonable suspicion. *Alberty* disapproved an instruction on flight that was "tantamount to saying to the jury that flight created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as axiomatic truth . . . ." *Ibid.* While disapproving this presumption, *Alberty* expressly allowed the jury "to take into consideration the defendant's flight from the country as evidence bearing upon the question of his guilt . . . ." *Id.*, at 510-511. The problem was that the trial court gave flight a presumptive strength it did not warrant. "The criticism to be made upon this charge is, that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient *to create a presumption of guilt*." *Id.*, at 511 (emphasis added). *Alberty*'s treatment of flight is consistent with flight supporting reasonable suspicion. Although in *Alberty* flight could not support a

4. The presumption of guilt from flight condemned in *Alberty* was probably a holdover from a common law provision that allowed the accused's goods and chattels to be forfeited if the jury found that he had fled because "the very flight is an offense, carrying with it a strong presumption of guilt, and is at least an endeavor to elude and stifle the course of justice prescribed by the law." 4 W. Blackstone, Commentaries 380 (1st ed. 1769). The harshness of this penalty kept it from being enforced. *Ibid.* It is believed that the rule was designed to deter flight from the jurisdiction instead of being a rule of evidence. See 2 J. Wigmore, Evidence § 276, p. 122 (Chadbourne rev. 1979).

presumption of guilt, it is *evidence* of guilt. Similarly, although flight from police alone does not provide enough evidence to amount to probable cause, it will satisfy the lower standard of reasonable suspicion. *Terry* does not require proof of guilt; the inference of guilt allowed in *Alberty* and *Allen* is more than enough suspicion for *Terry*.

By simply dismissing flight as a justification for a *Terry* stop, the Illinois Supreme Court avoids the balancing approach that has been taken by this Court in *Terry* and its progeny. The Illinois high court therefore avoids recognizing the great burden that its decision places on the police officer in the field. An officer's decision to initiate a *Terry* stop "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." See *Graham* v. *Connor*, 490 U. S. 386, 396 (1989) (use of force at *Terry* stop) (citing *Terry*, *supra*, 392 U. S., at 20-22). The officers in the present case drove by a young man who fled as the officers' car approached. The officers were then presented with two choices: pursue or allow him to flee. In deciding to pursue, the officers made a logical decision consistent with police practices that served a crucial government interest.

Suspicions are naturally aroused when someone flees from your approach. The suspicion will be all the greater when the person fled from is a police officer. A primary function of the police officer is investigation. See *Miranda* v. *Arizona*, 384 U. S. 436, 477 (1966). The investigative powers of the police initiating a *Terry* stop can be aimed at past, future, or current criminal conduct. See *United States* v. *Hensley*, 469 U. S. 221, 227-228 (1985). As flight is indicative of a guilty mind, it would be bad police practice to not investigate why the youths fled. Cf. *Terry*, *supra*, 392 U. S., at 23. "A person who manifests concern for the presence of police . . . who flees at the sight of an officer will commonly be detained and questioned." L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime

32 (1967).[5] *Terry* was never intended to punish officers for good, aggressive investigation. See *United States* v. *Cortez*, 449 U. S. 411, 419 (1981).

B. Flight vs. Walking Away.

Balanced against the interest of police officers in doing good work is defendant's interest in not being pursued and stopped. A person who has done nothing to arouse suspicion towards himself has a right not to have contact with or be questioned by the police. Therefore, if defendant wanted to avoid contact with the police and the police had no articulable suspicion of criminal conduct on his part, then the police must let him go. This was the basis of the Illinois Supreme Court's decision to invalidate the *Terry* stop. See *People* v. *Wardlow*, 701 N. E. 2d 484, 486-487 (1998) (quoting *State* v. *Hicks*, 241 Neb. 357, 363-364, 488 N. W. 2d 359, 363-364 (1992)). The Illinois Supreme Court apparently saw no difference between walking away and running away.

The problem with this decision is that it fails to take into account that there are many different ways of ending an encounter with police. A simple straightforward denial of a police request will not provide the officer with cause for a *Terry* stop. Thus a simple refusal to identify oneself cannot justify a frisk. See *Brown* v. *Texas*, 443 U. S. 47, 52-53 (1979). Similarly, a person is entitled to walk away from a police officer when asked to stop and respond to questioning. See *Smith* v. *United States*, 558 A. 2d 312, 316-317 (D. C. App. 1989) (en banc) (walking at "fast pace" but not "bolting" or "running" does not justify stop; running cases distinguished). If approached and questioned, a person may decline to answer and simply walk away. *Florida* v. *Royer*, 460 U. S. 491, 497-498 (1983).

Defendant's actions, however, were not the kind normally associated with innocence. He did not simply assert his right to

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5. This publication is the primary authority on police procedure in *Terry*. See *Terry*, 392 U. S., at 13-14, nn. 9-10.

avoid contact; he ran when he saw the officers' car. *Wardlow*, *supra*, 701 N. E. 2d, at 485. This indicated to the police that respondent had a guilty mind, which is worthy of investigation. Had defendant simply walked away, see *Smith*, *supra*, or had he simply held his ground and refused to answer any questions posed to him by the officers, see *Brown*, *supra*, there would have been no grounds for a *Terry* stop.

In *People* v. *Souza*, 9 Cal. 4th 224, 234-235, 885 P. 2d 982, 988 (1994), the California Supreme Court directly addressed the notion that the right to walk away somehow negated the suspicion that would otherwise arise from flight:

> "The United States Supreme Court's observation in *Florida* v. *Royer*, *supra*, 460 U. S. 491, 498 [75 L. Ed. 2d 229, 236-237], that a person approached by police for questioning may decline to answer the questions and 'may go on his way,' does not imply that the *manner* in which a person avoids police contact cannot be considered by police officers in the field or by courts assessing reasonable cause for briefly detaining the person. There is an appreciable difference between declining to answer a police officer's questions during a street encounter and fleeing at the first sight of a uniformed police officer. Because the latter shows not only unwillingness to partake in questioning but also unwillingness to be observed and possibly identified, it is a much stronger indicator of consciousness of guilt." (Emphasis in original).

As it was defendant's own decision to flee that imparted this information to the officers, he should not be allowed to use any right to avoid contact to negate their reasonable suspicion.[6] The Illinois Supreme Court's reasoning, if upheld, makes it too difficult for an officer to find out why someone flees from his presence. "The fact of flight is of itself significant; it becomes

6. The right to tender payment in Federal Reserve Notes, see 31 U. S. C. § 5103, does not negate the suspicion of buying airline tickets with a wad of $20 bills. See *United States* v. *Sokolow*, 490 U. S. 1, 8-9 (1989).

most significant when after all no explanation is forthcoming." 2 J. Wigmore, Evidence § 276, p. 129 (Chadbourne rev. 1979). Officers should be able to find the explanation for the individual's flight. *Terry* is meant to give the officer the opportunity to determine if ambiguous behavior betrays criminal intent. See *In re Tony C.*, 21 Cal. 3d 888, 894, 582 P. 2d 957, 960 (1978).

The reasonable suspicion requirement was affixed to *Terry* to limit police discretion.[7] Basing the stop on something more than a rumor or hunch limits the opportunity to harass civilians. See *supra* at 15-16. Flight provides exactly the type of objective basis for suspicion that properly limits the discretion of the officer in the field. Flight is both self-evident and articulable. It does not conjure up some vague and subjective standard. Cf. *Brown* v. *Texas*, *supra*, 443 U. S., at 49 (suspect "looked suspicious"). Although whether the suspect fled from police officers is occasionally at issue, flight is evident in the overwhelming majority of cases. See Hobson, *supra*, 3 Md. J. Contemp. Legal Issues, at 136-137, n. 138. It does not threaten arbitrary application, such as an officer's decision to pull a motorist over because he had nothing better to do. Cf. *Delaware* v. *Prouse*, 440 U. S. 648, 650-651 (1979). Flight is not indiscriminately applicable to a large number of innocent people, and it is not a "suspect classification." Cf. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 885-886 (1975) (Mexican ancestry).

In the heat of the moment, Officers Nolan and Harvey decided to find out what defendant was up to. In so doing, the officers did their jobs well. They were able to stop defendant, and they determined that he was engaging in criminal acts without arbitrarily infringing upon any of his rights. Good police work such as this deserves commendation, not condemnation.

7. See Part I B 2, *supra*, at 13-14.

C. A Single Rule.

Unprovoked flight from known police not only justifies the stop in the present case, but also supports a *Terry* stop in any circumstance. Although this Court is wary of establishing bright-line rules in Fourth Amendment cases, see *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996), this Court will draw lines to guide officers and the courts through the Fourth Amendment when appropriate. See *Maryland* v. *Wilson*, 519 U. S. 408, 413, n. 1 (1997). Although the factual context of defendant's flight in the present case strengthens reasonable suspicion, flight from a uniformed police officer will justify a *Terry* stop in almost any conceivable circumstance. This Court should recognize such flight's widespread strength and relevance, and establish that it always justifies a *Terry* stop.

Terry stops are evaluated under the "totality of circumstances" surrounding the stop and frisk. *United States* v. *Cortez*, *supra*, 449 U. S., at 417. In the present case, this involves placing defendant's flight in the context of its time and place, during the daytime, and in a high-crime area. See *supra* at 2. Both circumstances can give relatively innocent facts the proper context to support a reasonable suspicion finding. While the frequency of crime in an area does not alone justify a detention, see *Souza*, *supra*, 9 Cal. 4th, at 240-241, 885 P. 2d, at 992, the area's reputation for crime is an appropriate factor to consider when determining whether the *Terry* stop is reasonable. *Ibid* (citing *United States* v. *Sharpe*, 470 U. S. 675, 682-683, n. 3 (1985)).

The time of day is also relevant to some *Terry* stops. Officers believe that innocent people are less likely to be out at night. See 4 W. LaFave, Search and Seizure § 9.4(f), p. 187 (3d ed. 1996); L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 21 (1967). Courts also look to the time of day, finding that late hours and darkness make some actions more suspicious. See, *e.g.*, *Souza*, *supra*, 9 Cal. 4th, at 241, 885 P. 2d, at 992-993; *United States* v. *Lender*, 985 F. 2d 151, 154 (CA4 1993); *United States* v. *Watson*, 953 F. 2d 895, 897 (CA5

1992). Some courts have also found that some activities such as "hanging around" or loading boxes are not suspicious when conducted in daylight. See, *e.g.*, *Gibbs* v. *State*, 306 A. 2d 587, 593 (Md. App. 1973) ("hanging around"); *United States* v. *Kerr*, 817 F. 2d 1384, 1387 (CA9 1987) (loading boxes).

Unlike more innocent activities, flight from police is suspicious at any time, in any place. As noted above, nighttime is most often associated with criminal activity, giving police more reason to suspect that the fleeing suspect is planning or engaging in a crime. Suspicion also flows from daylight flight, however. Night's association with crime, and the difficulty of separating friend from foe in the darkness makes the night encounter potentially threatening to the person encountering the police. Therefore, an individual fleeing from an officer at night may think that he is fleeing from a potential aggressor rather than a police officer. This explanation does not hold during the day, as individuals can much better determine the identity and intent of approaching people. Daytime flight is also so unexpected it raises its own suspicions which a reasonable officer should investigate.

Nor does location fully explain flight. While, like darkness, the threat of crime reinforces the criminal intent associated with flight, flight from police in low-crime areas generate their own suspicions. As with darkness, people in high-crime areas may be more wary towards strangers. Unfortunately, some people in these areas may also be more fearful of police, such as recent immigrants from police states. Such innocent explanations are largely missing in lower-crime locations.[8] Activity that has both innocent and illicit possibilities supports a *Terry* stop. See Part I B 3, *supra*, at 14-16. Flight from police in safer locations is less likely to be innocent and is thus also suspicious.

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8. The existence of innocent reasons for flight in high-crime areas does not prevent reasonable suspicion from being formed. Ambiguous but suspicious behavior supports reasonable suspicion. See Part I B 3, *supra*, at 14-16.

If flight supports reasonable suspicion without regard to time or place, two of the more important variables in a *Terry* stop, see 4 LaFave, *supra*, §9.4(d), at 161-165 (discussing suspicious conduct regarding property and premises); *id.* §9.4(f), at 187-191, then flight from police will support a *Terry* stop under almost any conceivable circumstance. So long as the flight is unprovoked and from uniformed officers or a similarly known police presence, cf. *Wong Sun* v. *United States*, 371 U. S. 471, 482-483 (1963), *amicus* cannot conceive of a situation that would invalidate flight under *Terry*. Although courts must look to the factual context of the stop, see *Cortez*, *supra*, 449 U. S., at 417-418, flight from police is its own context. Drawing a bright line that allows flight alone to justify *Terry* stops will almost always yield the same result as would full analysis.

Holding that flight from a visible police presence will *per se* justify a *Terry* stop is thus the appropriate standard. Flight in this context creates a real suspicion of wrongdoing that warrants further investigation. See Part I B, *supra*. This level of suspicion is much more than enough to rise above the level of rumor or hunch, thus limiting opportunities for harassment. See *supra*, at 15-16. Since flight from police will justify a *Terry* stop in virtually any factual context, there is little to lose by making plain what will anyway become evident after painstaking case-by-case adjudication. Officers and the public will gain in the extra certainty and the freedom to investigate this inherently suspicious behavior. Recognizing that flight justifies a *Terry* stop would advance the primary goal of *Terry* —allowing police to do their jobs.

CONCLUSION

The decision of the Illinois Supreme Court should be reversed.

June, 1999

Respectfully submitted,

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(6)

No. 98-1036

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1998

THE PEOPLE OF THE STATE OF ILLINOIS
Petitioner,

vs.

SAM WARDLOW
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL SHERIFFS' ASSOCIATION, AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF THE PETITIONER.

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BRIEF OF *AMICI CURIAE*

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interes ed in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 17,000 members in 112 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Illinois Association of Chiefs of Police, represents law enforcement executives and administrators in the State of Illinois. It actively engages in training programs and publications for Illinois law enforcement officers, as well as *amicus curiae* advocacy in cases critical to law enforcement interests in the state.

Amici are national and state professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the process of investigative stops of individuals based upon reasonable suspicion within the bounds of the law; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of policy on the subject.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

The court below, *People v. Wardlow*, 183 Ill. 2d 306 (1998), ruled in a case of first impression for it that a person's sudden flight upon seeing the police in a high-crime area does not, by itself, justify an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968).

It held that the defendant's presence in an area with a high incidence of narcotics trafficking and his flight upon the approach of a police vehicle patrolling the area did not justify his investigatory stop.

SUMMARY OF ARGUMENT

Based on our experience as law enforcement practitioners and administrators at the state and national levels, *amici* believe that the better-reasoned view is that flight from a law enforcement officer in a high crime rate area constitutes reasonable suspicion under *Terry v. Ohio* for an investigative stop. AELE originally filed an *amicus curiae* brief in *Terry*, arguing for a common sense approach to police investigation of suspicious circumstances. Joined by other law enforcement organizations, we now submit that the time is ripe for this Court to

apply *Terry* to one of the most common events in law enforcement practice today.

Our position grows out of a concern that the ruling of the court below—if affirmed—would leave the residents of our inner cities defenseless in the face of burgeoning criminal activity largely centered around the scourge of the drug trade. Our inner cities have been turned into vast prisons for the innocent who reside there, powerless to deal with the flood of drug dealers and other criminals who prey upon them. Refusal of the courts to recognize a reasonable, common sense application of *Terry* to the type of activity involved in this case can only worsen this condition, as well as retarding progressive movements such as community policing designed to assist these communities.

We ask this Court to return to the roots of *Terry*, which *amicus* AELE supported by pointing out the common law origin of police investigative powers, and hold that flight from the police in a high crime rate area permits an investigatory detention. **The ruling we seek is not an extension of the rule of *Terry*, but what we submit is implicit in its holding.**

ARGUMENT

FLIGHT OF AN INDIVIDUAL FROM A POLICE OFFICER IN A HIGH-CRIME AREA UPON MAKING EYE CONTACT WITH THE OFFICER CONSTITUTES REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION UNDER *TERRY v. OHIO*.

The testimony of police officer Nolan (R. A8, A9) established that he and his fellow officers were assigned to investigate narcotics sales in various areas of the City of Chicago by patrolling these areas. His testimony also

established that the area in which defendant was found was one of those areas being patrolled by the officers because it was an area where there was a high incidence of narcotic sales.

The record further established that officer Nolan's car, which was passing in front of the defendant who was on a sidewalk, was the last car in a four car "caravan" that contained a total of eight officers. (R. A9, A10.) At the time officer Nolan was dressed in his full police uniform which included his police badge, name tag and a Chicago Police Department patch on his arm. (R. A11.) When defendant looked at officer Nolan and his partner, he started to run. (R. A6, A10.)

Defendant fled upon the approach of the police vehicle and upon seeing the police officers. The officers followed defendant in their car, with officer Nolan noticing that defendant was carrying a white opaque bag under his arm. Officer Nolan exited his car and stopped defendant. He immediately conducted a protective pat-down search of defendant, felt a hard object in the bag similar to the shape of a handgun, and seized a loaded handgun from the bag. (R. A12.)

Amici will not repeat the case law development of the court below and the parties indicating a split among the state and federal courts on the issue of whether flight from a police officer is sufficient for a *Terry* investigative stop. *See also*, cases collected at 4 LaFave, Search And Seizure, § 9.4(f) at 176-182 (3d ed. 1996). However, the language of one such case supporting the position favoring reasonable suspicion bears repeating here:

> Flight at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason

> for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well.

State v. Anderson, 454 N.W.2d 763, 766 (Wis. 1990).

Amici believe that this line of reasoning, which constitutes the better-reasoned view in the jurisdictions, represents a common sense viewpoint. We also recognize that enforcement activities such as took place in this case often occur in minority neighborhoods where crime rates are high. The neighborhood involved in this case is such a neighborhood.

Often the police may be mistrusted by some citizens in such neighborhoods and a few innocent persons may resent the inconvenience of a police contact. A small number of police officers may even have abused their powers under *Terry v. Ohio* to conduct investigative stops in an improper manner. In spite of our best efforts to prevent this, such abuse by a handful may happen from time-to-time.

We must recognize, however, that our best efforts of training, supervision, and discipline of police officers will not be entirely successful. However, as AELE pointed out in its *amicus curiae* brief filed in *Terry v. Ohio*, p. 16, even if some police officers abuse their powers that does not mean "that the *proper* exercise of such power should therefore be declared unconstitutional."

Indeed, looking at the facts that officer Nolan was faced with in the present case—where there was no question of improper motive or conduct on his part—if the officer had

not stopped the defendant it could be said that "[i]t would be poor police work indeed for an officer . . . to have failed to investigate further." *Terry*, 392 U.S. at 23. The fact that some officers abuse their powers does not change this, and honest police officers—who represent the majority—will not understand why a plainclothes officer could confront the defendant in *Terry* who was loitering in front of a jewelry store, but a uniformed officer could not confront the defendant in this case when he ran immediately upon seeing the officer.

This case raises the troublesome question of whether the police should withdraw from high crime rate areas simply because they are more likely to confront minorities. It is a fact that crime exists in some areas of our cities where minorities live. It is a fact that the police concentrate their efforts in high crime rate areas. They do so to protect the honest, law-abiding citizens who live in those areas. We do not believe that the police should abandon them and concentrate their protective efforts only in more affluent neighborhoods. In order to protect all of our citizens the police cannot close their eyes to the obvious as represented by the furtive actions of the defendant in this case.

The "obvious" is that "[f]light is circumstantial evidence of guilt; . . .," *Green v. State*, 206 Ga. App. 42, 424 S.E.2d 646, 649 (1992), and "undeniably suspicious behavior," *Platt v. State*, 589 N.E.2d 222, 226 (Ind. 1992). The Fourth Amendment does not require a policeman who has reasonable suspicion of criminal activity to simply shrug his shoulders and let a fleeing suspect disappear into the night. *Amici* would not expect the officers we advise to do so in the area involved in the present case anymore than if the action had taken place in an affluent suburb. As noted in *United States v. Pope*:

> Appellant's flight in the face of a clear showing of lawful authority supplied the agent with grounds to reasonably suspect that Appellant was engaged in criminal activity. *Flight invites pursuit and colors conduct which hitherto has appeared innocent* . . . [F]light from a clearly identified law enforcement officer may furnish sufficient ground for a limited investigative stop.

United States v. Pope, 561 F.2d 663, 668-669 (6th Cir. 1977) (emphasis added).

Amici know from our experience with community-based policing and direct contacts with the citizens our constituents serve, that law-abiding residents of our inner cities want skilled police officers to apply their training and expertise to make their streets safe. These citizens would undoubtedly think it to be the opposite of common sense and reasonableness to not investigate activity similar to that which took place in this case. Indeed, they would be highly critical of an officer who did *not* do what officer Nolan did in this case. They would echo the words of this Court in *Terry v. Ohio* quoted above. They would undoubtedly express that view at the many community-based policing meetings and other contacts made with municipal officials in their neighborhood.

Amici submit that our minority citizens would feel abandoned by the police who would ignore such obvious signs of suspicious behavior in their streets, especially in view of the fact that police officers are trained to recognize and do recognize the difference between innocent and suspicious behavior. We doubt that community policing will work if common sense and reasonableness—the touchstones of the Fourth Amendment—are not applied.

We believe that the framers of our Bill of Rights intended it to apply to all of our citizens, including those who live in high crime rate areas. *Amici* submit that the work of officer Nolan in this case fully comported with the requirements of *Terry v. Ohio*, was reasonable within the meaning of the Fourth Amendment, was a laudatory example of effective law enforcement, and was a significant benefit to the law-abiding community he serves.

CONCLUSION

Amici urge this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

The STATE OF ILLINOIS,

Petitioner,

v.

SAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Illinois

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, POLICEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION OF ILLINOIS, AND ILLINOIS POLICE ASSOCIATION, IN SUPPORT OF PETITIONER

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II. If flight by an individual, upon seeing the police, is not sufficient to constitute a "reasonable suspicion" of criminal behavior, then the presence of that individual in an area known for its high number of criminal offenses committed, based on statistical evidence or the officer's experience, is a significant articulable fact and a legitimate factor in determining "reasonable suspicion" of criminal activity. 14

A. A geographic area's reputation for criminal activity is an appropriate and legitimate factor for use when assessing the totality of the circumstances as to whether an investigative detention is reasonable under the Fourth Amendment. An area's definite reputation for such activity and the flight of an individual upon seeing the police in such an area constitutes a reasonable suspicion of criminal

behavior or activity. 14

B. A geographic area's reputation for criminal activity is usually known to law enforcement officers, based on their experience and familiarity with the area or on verifiable and objective criteria, including statistical data on the number of offenses reported and committed, or both. Official statistics confirm that the Chicago Police Department's 11th District is a demonstrated high crime area. 19

C. Even if it could be shown that the police officer in this case disproportionately applied Terry stops based on suspect class, the appropriate remedy would not be a weakening of Fourth Amendment jurisprudence under Terry, but rather administrative remedies, disciplinary actions, and relief under 42 U.S. Code Section 1983. . 26

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae National Association of Police Organizations, Inc. ("NAPO"), Policemen's Benevolent and Protective Association of Illinois ("PB&PA of Illinois"), and the Illinois Police Association ("IPA") submit this brief in support of Petitioner State of Illinois.[1] The *amici curiae* seek to reverse the judgment of the Supreme Court of Illinois, which affirmed the judgment of the Appellate Court of Illinois. That court reversed the trial court's denial of Respondent Sam Wardlow's motion to suppress physical evidence seized from him, which served as the basis for the charges against him and his conviction--based on a stipulated set of facts--during a bench trial.

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States.[2] Specifically, NAPO is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel) and 3,000 retired officers. In Illinois, NAPO represents the two other *amici curiae*, the PB&PA of Illinois and the IPA.

The PB&PA of Illinois is a nonprofit organization, comprised

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amici curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

[2]NAPO's section 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Education and Research Project, advocates the fundamental due process and workplace rights of officers.

of approximately 180 local units that include both active and retired municipal, county and state police officers. The PB&PA of Illinois is currently the second largest police organization in the State of Illinois, representing several thousand working police officers statewide, including Chicago Police Department Sergeants, Lieutenants, and Captains, through collective bargaining and legal and legislative advocacy. The IPA, an organization dedicated to advancing the interests of law enforcement officers, represents several thousand active and retired officers, including many from the Chicago Police Department.

The members of all three *amici curiae* associations have a significant interest in the important issues of law before this Court. Officers are sworn to enforce the criminal laws. To do so, they investigate potential violations in those localities with a reputation for high crime, apply their common sense, rely on their experience in deciding what is suspicious behavior, and stop individuals for questioning whenever they have reasonable suspicions of criminal behavior by such individuals, including suspicious flight.

If this Court were to hold that an individual's precipitous flight from identifiable law enforcement officers, either in or outside a high crime area, does not constitute an articulable fact sufficient to give rise to a reasonable suspicion of criminal behavior, then serious consequences would occur. Fewer individuals engaging in highly suspicious behavior would be questioned; fewer unlawfully concealed weapons would be found; more crimes would go unresolved; culpable individuals would commit even more crimes and victimize more individuals; and, in the end, we would become a more dangerous society.

In addition, should this Court accept an anticipated argument by an *amicus curiae* submitting a brief in support of the Respondent, asserting that the "high crime" designation of an area heavily populated by individuals of a racial or ethnic minority is constitutionally impermissible, and that the police should reduce their efforts in such areas, then the above consequences would be even more profound, particularly for the law-abiding residents of

these neighborhoods.

The Court's adoption of a clear and simple rule, authorizing investigative stops whenever an individual suspiciously flees from the police, would benefit effective and reasonable law enforcement efforts. Such a rule would support law enforcement officers who are called upon to make investigative stops whenever they have reasonable suspicion of criminal behavior.

In summary, NAPO seeks to provide the Court with meaningful insight into certain perspectives of the law enforcement profession. These include: first, the compelling need for police officers to investigate a suspect's flight upon seeing an officer, because such flight does constitute a reasonable suspicion of criminal behavior, both in high crime areas and other locales; and second, law enforcement's responsibility to allocate resources to and be present in high crime areas, thus designated based on the experience of officers and also, if available, statistical evidence.

WRITTEN CONSENT OF THE PARTIES

Counsel of record on behalf of *amici curiae* has received the written consents of the Petitioner and the Respondent, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

The *amici curiae* adopt the factual statement in the State of Illinois's December 22, 1998, petition for a writ of certiorari. What follows is a shorter narrative of the facts and proceedings, with additional statistical information.

On September 9, 1995, Officer Timothy Nolan was assigned to the special operations section of the Chicago Police Department to investigate narcotics sales in the Department's 11th District. Officer Nolan testified at the suppression hearing that District 11 is a high crime area, and that the locale of 4035 West Van Buren is

particularly known to have "high narcotics traffic". In fact, according to Chicago Police Department statistics, District 11 ranked 1st in murder and robbery, and 2nd in aggravated assault and criminal sexual assault out of all of the 25 police districts in the city in 1997.[3]

On September 9th, Officer Nolan was in full police uniform. He and seven other officers were driving eastbound on West Van Buren in four police vehicles.[4] As the officers were traveling Van Buren Street, Officer Nolan saw the Respondent, Sam Wardlow, standing near the front of 4035 West Van Buren. The Respondent looked at the officers and "took off running" away from them. Officer Nolan could see that the Respondent was carrying a bag under his arm. Officer Nolan pursued the Respondent, who ran down a gangway and then southbound through an alley. Officer Nolan and his partner were eventually able to corner the Respondent in the vicinity of 4036 West Congress Street.

Still in uniform, with his badge, patch, and name tag visible, Officer Nolan exited his vehicle and stopped the Respondent for the purpose of conducting a field interview. Officer Nolan testified that it is common to find weapons in the vicinity where narcotics are sold. Therefore, without asking the Respondent any questions, Officer Nolan conducted a "protective pat-down" search "for [his] own safety." In doing so, Officer Nolan squeezed the outside of the white opaque plastic bag that the Respondent was holding under his arm. The officer felt an object that was hard, heavy and similar in shape to a revolver. Officer Nolan then looked inside the bag and found a Colt .38 caliber handgun loaded with five bullets. The

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[3]*See* table in Appendix One of this brief.

[4]At least four cars are needed to converge on the same location because of the large number of people normally gathering in such an area, some of whom are buying unlawful drugs, while others are serving lookouts. In the instant case, Officer Nolan's car was last in the line of vehicles driving in the area. Officer Nolan could not recall if his police car was marked or unmarked.

officer arrested the Respondent, who was subsequently charged with two counts of Unlawful Use of a Weapon by a Felon and two counts of Unlawful Use of a Weapon (Indictment No. 95-CR-26952).

Respondent filed a pre-trial motion to suppress physical evidence. The trial court denied Respondent's suppression motion. The court observed that it is common knowledge that police officers know the areas where drugs are being sold, and that they also know the general areas where contraband, including weapons, are being carried. The trial judge found that police officers have a right to drive in these areas. The judge also observed that anybody can identify a police car, be it marked or unmarked. Based on all of the attendant circumstances, including the Respondent's awareness of the conditions that attracted the officers' presence in the area and the Respondent's flight upon looking in the officers' direction, the trial judge concluded that Officer Nolan was justified in stopping and questioning the Respondent, and in doing so, had a right to protect himself by conducting a pat-down search. Finally, the judge noted that once a person flees, after having looked in the direction of a police officer, "there's reason to think there's a problem; [the officers] have a right to make inquiry."

Following a stipulated bench trial, the Respondent was found guilty of the offense of Unlawful Use of a Weapon by a Felon and was sentenced to two years imprisonment.

Respondent appealed to the Illinois Appellate Court, First District, on the ground that the trial court erred in denying his motion to suppress the gun that was seized from him during the investigatory stop. On March 18, 1997, the Illinois Appellate Court reversed the trial court's decision, finding that the motion to suppress evidence should have been granted, because the revolver was discovered as a result of an improper investigatory stop. *People v. Wardlow*, 678 N.E.2d 65, 68 (Ill. App. Ct. 1997).

The State of Illinois appealed this decision to the Illinois Supreme Court. On September 24, 1998, the Illinois Supreme

Court affirmed the Illinois Appellate Court's decision to suppress the evidence, and found that Officer Nolan was unable to point to specific facts corroborating the inference of guilt gleaned from the defendant's flight. As a result, the Illinois Supreme Court held that the stop, search, and subsequent arrest of Respondent Wardlow were unconstitutional under the Fourth Amendment. *People v. Wardlow*, 701 N.E.2d 484, 488 (Ill. 1998).

The State of Illinois petitioned the Supreme Court of the United States for a writ of certiorari on December 22, 1998. The Court granted review on May 3, 1999.

SUMMARY OF ARGUMENT

Under the constitutional standard established in *Terry v. Ohio*, an officer may stop and investigate unusual or suspicious behavior, when the officer reasonably believes that the individual is engaged in criminal activity. Fleeing at the sight of a police officer--an obviously extreme means of avoiding the police--is a strong common-sense indicator of a guilty conscience in the minds of both a reasonable police officer and an ordinary citizen. Thus, flight is an "objective manifestation" giving rise to an articulable suspicion that the fleeing individual has committed or is about to commit a crime. As such, it justifies a temporary detention of the individual involved, allowing the police officer to briefly investigate his or her suspicious behavior.

Therefore, the Respondent's sudden and unprovoked flight upon viewing Police Officer Nolan was sufficiently suspicious by itself to justify a temporary investigatory stop pursuant to *Terry v. Ohio*. A reasonable police officer charged with enforcing the law and maintaining peace cannot ignore the inference that criminal activity may be afoot; to do otherwise, would be a dereliction of duty with serious consequences to public order.

In addition, characteristics of a geographic area may be taken into account in assessing the totality of suspicious circumstances. Consequently, an area's reputation for criminal activity is an

appropriate, articulable, and integral fact to consider when determining whether an investigative detention is reasonable under the Fourth Amendment. Succinctly stated, the location where suspicious behavior occurs is highly relevant in determining the existence of reasonable suspicion for a *Terry* stop. Hence, even if the Court decides that suspicious flight from a police officer is not, by itself, sufficient to give rise to reasonable suspicion, the fact that such flight occurred in a high crime area is an additional element, the combination of which strongly infers a guilty conscience in the person fleeing. Thus, fleeing in a high crime area supports a reasonable suspicion and justifies an investigative detention.

The reputation of an area for having substantial criminal activity can be based, not only on the objective knowledge and experience of police officers, but on verifiable and quantifiable data. Sophisticated data collection, geographical computer and other mapping, and detailed geographical analysis systems have all become an essential part of crime prevention. Determining which locales or neighborhoods are high crime areas, and knowing what types of crimes are prevalent in those areas, results in a more efficient allocation of resources and thus more effective law enforcement, as was occurring in this case.

Chicago Police District 11, where the Respondent fled from the police, is such a high crime area. In 1997, District 11 had a higher overall total crime rate than 13 of the 25 police districts, roughly an equal crime rate to two of the districts, and a lower crime rate than 9 of the districts. When broken down further, this data reveals that in 1997, District 11 had the highest number of murders and robberies, and the second highest number of criminal sexual assaults and aggravated assaults, of all the police districts in Chicago. This data clearly indicates that District 11 is a high crime area, and contradicts the Respondent's assertion, as stated in his brief in opposition to the petition for a writ of certiorari, of lack of evidence on that issue.

The ability to quantify reports of crime refutes any claim that the police disproportionately or discriminatorily target areas that

have large ethnic or racial minority populations, thus causing those areas to have higher than average arrest statistics, an argument which we anticipate may be posited by an *amicus curiae* on behalf of the Respondent. Any such assertion is erroneous for all for the following reasons: first, victim reports and calls for service are factored into the data; and, second, research demonstrates that not all minority neighborhoods suffer from high crime and victimization, and that high crime also exists in other neighborhoods. This is certainly the case in Chicago. The Chicago data set forth in this brief demonstrates that neighborhoods in Chicago, as elsewhere, do not have to be predominately populated by racial or ethnic minorities in order to be labeled as high crime areas. Thus, when patrolling any of these locales, a Chicago police officer would take into account that he or she is, in fact, in a high crime area, when considering the totality of the circumstances applying to a particularly suspicious individual or situation.

This rebuts insinuations that using area as a factor in determining reasonable belief has a discriminatory effect on racial or ethnic minorities. If anything, the opposite is true. While objective statistics do show that many high crime areas are found in urban neighborhoods with large racial or ethnic minority populations, data also show that the minority residents of these neighborhoods are much more concerned about crime and have higher victimization rates than any other demographic group. In fact, crime prevention efforts targeting specific neighborhoods have served as an invaluable tool in providing the residents of these communities with the protection that they not only desire, but so rightly deserve. To reduce law enforcement efforts in these neighborhoods would disproportionately subject their law-abiding residents to increasing victimization and would be a clear denial of the Equal Protection Clause of the Fourteenth Amendment.

In summary, the totality of circumstances demonstrates a reasonable suspicion that the Respondent was engaged in criminal behavior, and justifies the investigative detention of the Respondent. Therefore, the subsequent search and arrest of the Respondent were valid under the Fourth Amendment.

ARGUMENT

I. Flight of an individual, upon seeing a law enforcement officer, is undeniably suspicious activity because it is well settled in the law that flight is consistent with recent, ongoing or planned criminal behavior. Such flight creates a reasonable suspicion in the mind of a police officer that the individual has engaged or may engage in criminal activity. Therefore, it justifies an investigative stop of the individual under the Fourth Amendment.

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures". In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), this Court created an exception to the general rule that, under the Fourth Amendment, searches and seizures are invalid unless supported by probable cause. In *Terry*, the Court held that certain seizures are justifiable under the Fourth Amendment if there is an articulable suspicion that a person has committed or is about to commit a crime. *Id.* at 26. While recognizing that a temporary investigative stop by a police officer is a "seizure" under the Fourth Amendment, this Court held that a police officer may stop and investigate unusual behavior, even without probable cause to arrest, when the officer reasonably concludes that the individual is engaged in criminal activity. *Id.* at 22. In so doing, the Court explained that in order to justify a warrantless intrusion, the police officer need not have probable cause to make an arrest, but "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21-22.

The *Terry* investigative stop focuses on the reasonableness of the officer's conduct. *State v. Jackson*, 434 N.W.2d 386, 389 (Wis. 1989). . The constitutional validity of such a stop hinges on whether or not "the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate." *Terry*, 392 U.S. 1 at 21-22. In order to establish the reasonableness of an officer's conduct, the investigative stop must be "justified by some objective

manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 2640 (1979).

Because the temporary detention of a person for the purpose of investigating possible criminal activity is less intrusive than an arrest, the standard for such a stop, "reasonable suspicion", is less demanding than the "probable cause" standard needed for an arrest. *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981). A reasonable suspicion to investigate unusual behavior, is based on "some objective manifestation" that "criminal activity is afoot." *Cortez*, 449 U.S. at 417. In *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585 (1989), this Court stated: "[The] 'reasonable suspicion' necessary to justify a brief, investigative detention is a level of suspicion that is 'obviously less demanding than that for probable cause' and can be established by 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" In *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416 (1990), this Court stated that the "reasonable suspicion" standard is different than the probable cause standard in terms of the quality and content of the information required to establish it; therefore, "reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Id.*

In determining the reasonableness of the investigative stop, due weight must be given to the officer's experience and training, and the evidence must be viewed as it would "be understood by those in law enforcement." *Cortez*, 449 U.S. at 418. Thus, the facts are viewed "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 565 N.E.2d 1271, 1273 (Ohio 1991). And "The officer's experience may be a consideration in ascertaining whether his inferences from the given facts were reasonable." *State v. White*, 660 So.2d 515, 519, (2nd Cir. 1995).

In the mind of a reasonable police officer, or even an ordinary citizen for that matter, flight at the sight of police officers is

indicative of a guilty conscience. In *Peters v. New York*, 392 U.S. 40, 67, 88 S.Ct. 1889, 1905 (1968), this Court stated that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea." The 6th Circuit has held that "Flight invites pursuit and colors conduct which hitherto has appeared innocent", *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977), because, as the 4th Circuit maintains, most people do not normally break into flight in the opposite direction upon seeing a police officer. *See United States v. Haye*, 825 F.2d 32 (4th Cir. 1987). Clearly, it defies common sense to conclude that flight at the sight of police officers is not "undeniably suspicious behavior." *State v. Anderson*, 454 N.W.2d 763 (Wis. 1990). As iterated long ago, "Wicked people run away when no one chases them, but those who live right are as brave as lions." Proverbs 28:1, *Holy Bible* (C.E.V.).

Admittedly, suspicious behavior is, by its very nature, ambiguous. *State v. Williamson*, 524 A.2d 655, 660 (1987). In *Reid v. Georgia*, 448 U.S. 438, 441, 100 S.Ct. 2752, 2754 (1980), this Court stated that "there could ... be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Id.* Thus, the possibility of an innocent explanation does not "deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct." *Williamson*, 524 A.2d at 660. In reality, the principal function of the *Terry* investigative stop is to resolve the ambiguity inherent in suspicious behavior, such as flight at the sight of a police officer, in order to allow the officer to establish whether the individual is in fact engaged in illegal activity. *In re Tony C.*, 582 P.2d 957, 960 (Cal. 1978). The *Terry* investigative stop recognizes that the essence of good police work embodies the officer's ability to perform a brief stop of an individual, who flees at the sight of the police, "in order to determine his identity or to maintain the status quo momentarily while obtaining more information." *Adams v. Williams*, 407 U.S. 143, 145-146, 92 S.Ct. 1921, 1923 (1972). By investigating the matter further, the police are able to quickly determine whether they should allow the suspect to "go about his business or hold him to answer charges." *In re Tony C.*, 582 P.2d at 960.

Furthermore, in *Adams v. Williams*, *supra*, this Court held that the Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply "shrug his shoulders and allow a crime to occur or a criminal to escape." 407 U.S. at 145. Thus, while it is true that on rare occasion individuals flee at the sight of the police for reasons other than guilt associated with criminal activity, "a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot." *Anderson*, 454 N.W.2d at 766. In the present case, it would have been substandard police work had Officer Nolan failed to investigate Respondent Wardlow's suspicious behavior of fleeing at the sight of the police officers.

The manner in which a person avoids the police is an important aspect in determining the reasonableness of the police officer's decision to briefly detain an individual. In cases where flight has been held to indicate consciousness of guilt, the accused reacted to "a known police presence by running, rather than walking, away." *Smith v. United States*, 558 A.2d 312, 316-317 (D.C. 1989). There is a fundamental difference between an individual's constitutional right to move away from the police by refusing to listen or answer the officer's questions and the situation here, where an individual "took off running" after looking at the police officer. In *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 1324 (1983), this Court stated that a person approached by a police officer, "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* (quoting *Terry v. Ohio*, 392 U.S. at 32-33).

In the present case, the key issue is whether a person's sudden and unprovoked flight is sufficiently suspicious to justify a temporary investigatory stop pursuant to *Terry*. In *People v. Souza*, 885 P.2d 982, 988 (Cal. 1994), the court stated, "There is an appreciable difference between declining to answer a police officer's questions during a street encounter and fleeing at the first sight of a uniformed police officer." Fleeing at the sight of the

police is a much stronger indicator of consciousness of guilt than declining to answer a police officer's questions, because it shows "not only [an] unwillingness to partake in questioning but also [an] unwillingness to be observed and possibly identified." *Id.* Thus, extreme means of avoiding the police, such as high-speed flight, justifies a temporary investigative stop.

In order for a law enforcement officer to meet the "reasonable suspicion" standard, enabling the officer to investigate unusual behavior, he or she must articulate something more than an "inchoate and unparticularized suspicion or 'hunch' that the individual has been, is, or is about to be engaged in criminal activity." *Terry*, 392 U.S. at 27. The flight that occurred in this case is certainly much more than a "unparticularized suspicion" or "hunch".

Furthermore, a decision by this Court, holding that flight at the sight of law enforcement officers is a sufficient "objective manifestation" giving rise to "reasonable suspicion," would not give the police unbridled power to make arbitrary or capricious stops, nor would it alter what constitutes probable cause. Rather, it would simply allow the officer to temporarily stop the fleeing individual. As the Wisconsin Supreme Court stated in *Anderson*, 454 N.W.2d at 768, "We emphasize that the temporary stop we authorize is just that: temporary. It is not, without more, an arrest with all the rights the police have attendant to an arrest. It is the right to temporarily freeze the situation in order to make investigative inquiry." Ultimately, the reasonableness of a *Terry* investigative stop comes down to a common sense question which "strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions." *State v. Guzy*, 407 N.W.2d 548 (Wis. 1987), *cert. denied*, 484 U.S. 979, 108 S.Ct. 494 (1987).

In sum, flight at the sight of a police officer is an "objective manifestation" which gives rise to an articulable suspicion that the fleeing individual has committed or is about to commit a crime. Therefore, a police officer is justified in temporarily detaining that

individual to further investigate his or her suspicious behavior. A decision by this Court embodying this clear and simple rule would benefit effective and reasonable law enforcement efforts and support law enforcement officers who are called upon to make investigative stops whenever they have reasonable suspicion of criminal behavior.

II. If flight by an individual, upon seeing the police, is not sufficient to constitute a "reasonable suspicion" of criminal behavior, then the presence of that individual in an area known for its high number of criminal offenses committed, based on statistical evidence or the officer's experience, is a significant articulable fact and a legitimate factor in determining "reasonable suspicion" of criminal activity.

A. A geographic area's reputation for criminal activity is an appropriate and legitimate factor for use when assessing the totality of the circumstances as to whether an investigative detention is reasonable under the Fourth Amendment. An area's definite reputation for such activity and the flight of an individual upon seeing the police in such an area constitutes a reasonable suspicion of criminal behavior or activity.

In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975), this Court recognized that the characteristics of a geographic area may be taken into account in determining whether or not "reasonable suspicion" exists to justify a *Terry* investigative stop. In that case, which concerned the ability of the Border Patrol to stop a vehicle near the Mexican border, the Court stated:

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. [Citations omitted.]

> They may also consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or *obvious attempts to evade officers* can support a reasonable suspicion.

Id. at 885. (Emphasis added.)

In *United States v. Cortez, supra*, this Court recognized the importance of considering the "totality of the circumstances" in determining the validity of an investigative stop. The Court stated:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

449 U.S. at 417-418. The Court delineated a two-part test for analyzing the "totality of the circumstances", each of which must be present before a stop is permissible. First, the assessment of the stop must be based upon all the circumstances and, second, the assessment must raise a suspicion that the particular individual being stopped has been, is, or is about to be, engaged in wrongdoing. *Id.* at 418.

As to the circumstances surrounding a *Terry* investigative stop, the Court stated in *Cortez* that:

> The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these

> data, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person.

Id. Thus, in determining whether or not to make an investigatory stop, a police officer can take into consideration the area where the suspicious behavior occurred. The Court further stated:

> [This case] implicates all of the principles just discussed--especially the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion.

Id.

Furthermore, in explaining the deference courts should give to law enforcement officers' conclusions concerning the "totality of the circumstances", the Court stated:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact finders are permitted to do the same--and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Id.

In *People v. Souza, supra,* another case addressing flight, the California Supreme Court, relying on *Terry* and *Cortez,* held that "[a]n area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is

reasonable under the Fourth Amendment." 885 P.2d at 991 (citing *United States v. Sharpe,* 470 U.S. 675, 682-683, note 3, 105 S.Ct. 1568, 1573-1574, note 3 (1985)). While noting that presence in a high crime area is not, standing alone, sufficient to justify a *Terry* investigative stop, the California court recognized that there are certain geographical areas where crime is more prevalent, as compared to other areas. *Id.* (citing *People v. Holloway*, 176 Cal. App. 3d 150, 155 (1985)). In *Souza*, the court specifically considered the disproportional concentration of crime in certain geographic areas and the need for law enforcement officers to protect the citizens of these high crime areas; the court stated:

> Nevertheless, it would be the height of naivete not to recognize that the frequency and intensity of these sorry conditions are greater in certain quarters than in others. Consequently, we must allow those we hire to maintain our peace as well as to apprehend criminals after the fact, to give appropriate consideration to their surroundings and to draw rational inferences therefrom, unless we are prepared to insist that they cease to exercise their senses and their reasoning abilities the moment they venture forth on patrol.

Id. at 991 (citing *People v. Holloway*, 176 Cal. App. 3d 150, 155 (1985)).

In *United States v. Rundle*, 461 F.2d 860 (1972), the United States Court of Appeals for the Third Circuit held that a high crime area is a significant factor in justifying a *Terry* investigative stop. In that case, two Philadelphia police officers observed four males running from the steps of a drug store in an area known for burglaries. In holding that the police officers had a reasonable suspicion that the suspects were involved in criminal activity, the court focused on the fact that the police officer's testimony established that the "area was in a high crime district, and that the officers were always on the lookout for robberies of business establishments." *Id.* at 862. The court explained that:

> When they [officer Meehan and officer Penko] first observed the four young men the officers were on their way to the drug store for the specific purpose of signing a log in the store. The stores in the neighborhood maintained such logs because the police were required to check those locations at regular intervals to guard against robberies. Robberies usually took place around the time the store opened and around closing time, which was 10 P.M. When he saw the young men fleeing from the drug store, he concluded a crime was either being perpetrated or about to be perpetrated.

Id.

In *State v. Andrews*, *supra,* the Ohio Supreme Court held that "[a]n area's reputation for criminal activity is an articulable fact which is a part of the totality of circumstances surrounding a stop to investigate suspicious behavior." 565 N.E.2d at 1274. In that case, a police officer was patrolling a locale that was an "area high in drug activity, violence, and weapons-related crime." *Id.* at 1271. In its holding, the court stated that the officer was "an experienced police officer with twelve and a half years on the force" and was "aware of the character of the area as he had been working there for a month and a half, and he was also familiar with police activity reports for the area." *Id.* at 1271-1274. Accordingly, the court found that the facts, including the locale's reputation as a high crime area, supported the officer's reasonable suspicion that the suspect was engaged in criminal activity. *Id.* at 1274.

In summary, under the totality-of-the-circumstances analysis, a geographical area's reputation for criminal activity is an appropriate factor in assessing the reasonableness of an investigative stop. As stated in *Souza, supra,* "[T]ime, locality, lighting conditions, and an area's reputation for criminal activity all give meaning to a particular act of flight, and may suggest to a trained officer that the fleeing person is involved in criminal activity." 885 P.2d at 991. Therefore, presence in a high crime area, coupled with an individual's "nervousness or flight or

suspicious actions upon approach of the officers, is sufficient to justify an investigatory stop." *Id.; see also State v. Jones*, 450 So.2d 692 (La. Ct. App. 1984); *State v. Stinnett*, 760 P.2d 124 (Nev. 1988); *State v. Butler*, 415 S.E.2d 719 (N.C. 1992); *State v. Glover*, 806 P.2d 760 (Wash. 1991); and *Stephenson v. United States*, 296 A.2d 606 (D.C. 1972).

B. A geographic area's reputation for criminal activity is usually known to law enforcement officers, based on their experience and familiarity with the area or on verifiable and objective criteria, including statistical data on the number of offenses reported and committed, or both. Official statistics confirm that the Chicago Police Department's 11th District is a demonstrated high crime area.

While courts have widely accepted the use of a locale's reputation for criminal activity as a legitimate factor to be assessed when determining the existence of reasonable suspicion justifying a *Terry* stop, there are some who charge that factoring in an area's reputation for crime is inappropriate. They discredit the legitimacy of the existence of high crime areas, referring to them as "so called high crime areas,"[5] and have gone so far as to assert that "some police officers describe all areas that way."[6] Critics also argue that there are no objective criteria established for determining how much crime is required to qualify an area as having high crime,[7]

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[5]David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994)(citations omitted).

[6]*Id.* at 672 (citing Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 222 n.42 (1983)).

[7]Brian J. O'Connell, *Search and Seizure: The Erosion of the Fourth Amendment Under the Terry-Standard, Creating Suspicion in High Crime Areas*, 16 U. DAYTON L. REV. 717, 729 (1991) (citing *People v. Bower*, 24 Cal. 3d 638, 648 n.8, 597 P.2d 115, 120 n.8, 156 Cal. Rptr. 856, 860 n.8 (1970)).

and that "the eagerness with which locations are declared high crime areas should generate skepticism in courts, but it does not."[8]

In response, *amici curiae* law enforcement officer associations assert that "high crime areas" are not determined in an arbitrary and capricious manner, but are so defined based on verifiable quantitative and qualitative factors, as well as strong anecdotal evidence. While *amici curiae* are not suggesting that a suspect's presence in such an area is of itself a sufficient basis to make an investigatory stop, an area's reputation is an integral factor in determining whether reasonable suspicion is warranted in light of the totality of the circumstances. Further, the use of area as a factor has had a major beneficial effect in high crime neighborhoods. It has served as an invaluable tool in providing the residents of these communities with the protection that they rightly deserve.

The use of geographical factors in policing is the subject of extensive ongoing studies.[9] In conducting these studies, researchers rely on computer mapping as a fundamental tool when working with geographical data.[10] Aided by advancements in technology, computer mapping, which can encompass the production of a simple pin map or the complex interactive mapping for detailed geographical analysis, has become an essential part of

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[8]Harris, *supra,* note 1, at 672 (citing Johnson, *supra*, note 2, at 255).

[9]*See generally* Keith Harries, Ph.D., *Geographic Factors in Policing,* POLICE EXECUTIVE RESEARCH FORUM, 1990, at 1 (stating that such study is part of the emerging field of environmental criminology and has "attracted a variety of practitioners, including law enforcement specialists, sociologists, geographers, architects, urban planners, social psychologists, economists, and others who are assessing crime factors and developing ways in which social and physical contexts can be utilized in such a context."), *and* The Institute for Justice Crime Mapping Center (CRMC) <http://www.ojp.usdoj.gov/cmrc/mission/welcome.html>. CRMC is a leader in the development and promotion of crime mapping.

[10]*See* Harries, *supra,* note 5, at 27.

crime prevention in larger cities.[11] Much of this information is used in planning the deployment of resources for the prevention and suppression of criminal activities.[12] In particular, policing strategies, such as community policing and problem-oriented policing, are reaping the benefits of mapping due to their focus on identifying and addressing specific community problems.[13]

An example of the complexity, uses, and benefits of mapping crime and determining high crime areas is illustrated by the experience of the San Diego Police Department:

> [At the] San Diego, CA Police Department, a centralized unit of crime analysts draws on data maintained in a drug information network system. This network accesses several different databases such as crime records, computer-aided dispatch data on drug complaints, citizen reports of drug dealing reported directly to the narcotics section, patrol intelligence data and other drug-related data. Analysts merge data from these systems into a geographical mapping package. The maps and supporting information are sources available to patrol officers and members of the narcotics unit.[14]

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[11]*See generally* J. Thomas McEwen and Faye S. Taxman, *Applications of Computer Mapping to Police Operations,* in *Crime and Place* 259 (John E. Eck and David Weisburd ed., Criminal Justice Press and The Police Executive Research Forum, 1995).

[12]*See generally,* TEMPE IN TOUCH, *infra,* note 18.

[13]Dennis P. Rosenbaum and Paul J. Lavrakas, *Self-Reports About Place: The Application of Survey and Interview Methods to the Study of Small Areas,* in *Crime and Place* 289 (John E. Eck and David Weisburd, ed., *supra*) (highlighting the fact that problem-oriented policing model has forced police administrators and researchers to pay special attention to the location of crime).

[14]McEwen, *supra,* note 7, at 262.

Other cities also use computerized mapping,[15] including:

- Dallas, TX, where the police department merged census data into its record management system, allowing for the production of maps showing the relationships among violent crimes, drug trafficking areas, and demographic characteristics of the city;[16]
- Baltimore, MD, where, through the use of multiple regression models and analytical mapping of spousal assaults and census data, researchers created a model to help police officers identify areas where spousal assault cases may be occurring but are not reported;[17]
- Tempe, AZ, where mapping is used by the Tempe Police Department's Crime Analysis Unit to provide officers with timely and pertinent information relative to crime patterns and trend correlations, which is broken down into areas of just a few blocks, and is readily retrievable at the City website (<http://www.tempe.gov/cau/default.htm>); [18] and
- Chicago, IL, where advanced computerized mapping techniques helped the police department to develop an early warning system for violence, identifying areas that are at high risk for serious street-gang violence and homicide, thus not only saving lives, but identifying areas where local community action groups which work with youth are most needed.[19]

Critics may argue that even when scientific methods based on

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[15]The Crime Mapping Research Center lists 18 cities that actually have current data/crime maps on the Internet, found at <http://www.ojp.usdoj.gov/crmc/weblinks/welcome.html>.

[16]McEwen, *supra,* note 7, at 262.

[17]*Id.* at 271-274.

[18]*Tempe Police Department Crime Analysis Unit*, TEMPE IN TOUCH, <http://www.tempe.gov/cau/default.htm>.

[19]McEwen, *supra,* note 7, at 268-271.

quantifiable evidence are employed, the resultant maps are not reliable because they ignore undetected crime in other areas. The basis for their claim is the mistaken belief that police disproportionately or discriminatorily target areas that have large ethnic or racial minority populations, thus causing those areas to have higher than average arrest statistics. As a result, opponents may contend that the higher arrest rates skew crime incident data, leading to the conclusion that most neighborhoods with a high minority population are high crime areas. This reasoning is flawed. The data used in mapping crime statistics is not based solely on police arrests, but relies heavily on calls for service and victim reports, as well as independent survey data from local residents.[20]

Granted, statistics do show that many high crime areas are in poor urban neighborhoods with large racial or ethnic minority populations.[21] In fact, as a group, minority residents of urban neighborhoods are much more concerned about crime and have higher victimization rates than any other demographic group.[22]

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[20]*See generally* Rosenbaum, *supra,* note 8, at 291; *and* Michael Rand, *Criminal Victimization 1997 Changes 1996-97 with Trends 1993-97*, BUREAU OF JUSTICE STATISTICS NATIONAL CRIME VICTIMIZATION SURVEY, N.J.-173385, Dec. 1998 at 10, which can be found at <http://www.ojp.usdoj.gov./bjs/abstract/cv97.htm>.

[21] *See* Harries, *supra* note 5, at 7 (stating that "[o]lder cities with a concentric pattern of land uses will tend to have crime clustered toward the center, where the poorer population groups are located" and "[w]here low income housing is dispersed in older cities, those nodes of low income housing will tend to become secondary centers of crime."), *and* Carol J. DeFrances and Steven K. Smith, *Crime and Neighborhoods*, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF, N.J.-147-005, June 1994, <http://www.ojp.usdoj.bjs.abstract/can.htm> *but see*, Rand *supra* note 15, at 9 (stating that between 1993 and 1997, urban households did experience greater declines in property crime rates than suburban or rural households).

[22]Carol J. DeFrances, Ph.D and Steven K. Smith, Ph.D., *Perceptions of Neighborhood Crime, 1995*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, N.J.-165811, April 1998, at 9, <http://www.ojp.usdoj.gov/bjs/abstract/phc95.htm>.

Nevertheless, research also demonstrates that not all poor urban minority neighborhoods suffer from high crime,[23] and that high crime also exists in other neighborhoods as well.[24] This is certainly the case in Chicago, as discussed below.

II

The Respondent's brief in opposition to certiorari asserts that the Illinois Supreme Court paid too much deference to the trial court's finding that District 11, where the incident occurred, is a high crime area.[25] In response, *amicus curiae* maintains that this claim lacks merit, and presents the following statistics in order to dispel any doubts as to whether District 11 is indeed a high crime area, should the Court accept the Respondent's argument, and reject the Illinois Supreme Court's finding that the officer's "uncontradicted and undisputed testimony" was sufficient to establish this fact.

Chicago has 25 police districts. (See Appendix 1 for tables of the police district crime data issued by the Chicago Police

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[23] *See* Harries, *supra*, note 5 at 5 (stating that "[m]uch depends on the prevailing values of the community. Not all poor communities are crime-ridden. In some, community values are strong and tend to curb criminal behavior.").

[24] *Id.* at 7 (stating that: 1) newer cities that don't have a dominant old core area, but have sorted patterns of districts of various types, will tend to have a more dispersed pattern of high crime areas; 2) spread-out shopping areas and an excess of strip commercial development give newer cities a higher potential for property crime; 3) transportation arteries tend to attract or generate criminal activity due to the large number of opportunities and ease of mobility; 4) cities laid out on a grid network are likely to have higher levels of crime because criminals are better able to learn the city and navigate in it; 5) increased crime rates will also tend to follow industrial and commercial activities that move out of central cities to the suburbs; and 6) higher rates of crime often occur around major entertainment areas, such as stadiums).

[25] Respondent's brief in opposition to petition for certiorari at 5.

Department.). In 1997 (the most recent annual information available), District 11 had a higher overall total crime rate than 13 of the 25 police districts, roughly an equal crime rate to two of the districts, and a lower crime rate than 9 of the districts. (In 1997, there were 260,504 serious criminal offenses, excluding drug offenses, committed in Chicago).

When broken down further, however, this data becomes more telling. Although there are 15 police districts in Chicago with larger populations,[26] District 11 had the highest number of murders and robberies (with 69 murders or 9 percent of all murders, and 1,924 robberies or 7.6 percent of all robberies), and the second highest number of criminal sexual assaults and aggravated assaults (with 191 criminal sexual assaults or 7.5 percent of all criminal sexual assaults, and 2,900 aggravated assaults or 7.9 percent of all aggravated assaults) of all the districts in Chicago. This clearly indicates that District 11 is a high crime area.[27] By contrast, 18 districts had higher theft rates than District 11, and for some of these districts, theft accounted for a disproportionately high amount of total crime. Based on this information, the Chicago police officer's assertion that District 11 is a high crime area is based, not on unfounded speculation, but on verifiable and objective facts.

Further, when viewed in combination with Chicago's population, these statistics show that neighborhoods in Chicago, as elsewhere, do not have to be predominately populated by racial or ethnic minorities in order to be labeled as high crime areas. For example, District 18 had 12,312 thefts or just over 10 percent of all thefts, and District 1 had 10,167 thefts or 8.5 percent of all thefts, clearly making these areas "high crime areas." When looking at Districts 1, 18, and 11, we find that, in 1990 (the most recent year

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[26] See Appendix 2.

[27] These statistics do not list drug offenses. Nevertheless, in neighborhoods where drug dealing is commonplace, frequent conflicts over turf arise, leading to correspondingly high levels of violence. *See* Harries, *supra* note 5, at 6.

for which population data are available), District 1 was 66.3 percent white and District 18 was 78.7 percent white, while District 11's population was 96 percent minority.[28]

Thus, a Chicago police officer patrolling any of these locales would take into account that he or she is in a high crime area, when considering the totality of the circumstances applying to a particularly suspicious individual or situation. This rebuts insinuations that using area as a factor in determining "reasonable suspicion" discriminates against racial or ethnic minorities.

C. Even if it could be shown that the police officer in this case disproportionately applied *Terry* stops based on suspect class, the appropriate remedy would not be a weakening of Fourth Amendment jurisprudence under *Terry*, but rather administrative remedies, disciplinary actions, and relief under 42 U.S. Code Section 1983.

Amici curiae law enforcement officer associations condemn any instances of blatant racial or ethnic discrimination by law enforcement officers, including *Terry* stops, based solely on an individual's race or ethnicity, and not on reasonable suspicion. Such discrimination not only violates the law which officers have sworn to uphold, but also ruins the bonds of community trust and the public's expectation of fairness in the equal application of the law. If it were shown that *Terry* stops were applied disproportionately based on a suspect class, rather than on reasonable suspicion, the remedy would not be to weaken Fourth Amendment jurisprudence, but rather to pursue remedies that address the source of the problem, such as administrative remedies, disciplinary action, or recourse under Section 1983. To do otherwise would be tantamount to beginning a process of racial and ethnic parity in fighting crime.

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[28]See Appendix 2.

Irrespective of remedies, *amici curiae* urge the Court to consider the ramifications of any restrictions placed on law enforcement officers based on the race or ethnicity of those properly stopped for investigative purposes. If law enforcement officers cannot patrol high crime areas with large minority populations, or must be reluctant to stop individuals when they have reasonable suspicion to do so--fearing accusations of discrimination or racism--then we, as a society, will be subjected to an unofficial law enforcement practice of reverse discrimination or unofficial parity based on race or ethnicity. Most Americans do not want, and the U.S. Constitution does not compel, government agencies to adopt and apply either official or unofficial law enforcement policies of reverse discrimination or parity. Such policies could result in 1) a lesser amount of evidence being required for reasonable suspicion as applied to whites, and a greater amount of evidence being required for reasonable suspicion as applied to individuals of color, or 2) selective or reduced law enforcement, such as decisions not to patrol high crime areas in minority neighborhoods as frequently, notwithstanding suspected criminal activity, either of which would likely constitute a denial of equal protection under the law.

In summary, the Court may be tempted to consider an anticipated argument by an *amicus curiae* supporting the Respondent, asserting that designating an area populated mostly by individuals of color as a high crime area is, at best, an insensitive and discriminatory policy, or, at worse, a blatantly racist act, and that otherwise proper investigative stops of individuals in such areas under the *Terry* standard promote such an improper policy or act and must be rejected as constitutional violations. The day-to-day experience of law enforcement officers and the detailed and thorough collection and analysis of crime data, described above, should lay waste to that claim.

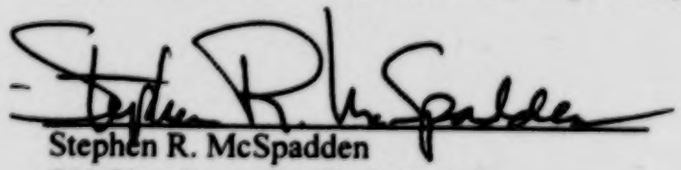
If, however, the Court accepts that position and renders a decision in this case based on it, then law enforcement officers across the country will be deterred from enforcing the laws in predominately minority neighborhoods with high criminal activity. This would send the wrong message to criminals across the country and would likely increase crime, victimizing those law-abiding persons living in these high crime neighborhoods. In terms of this case, raising the bar on the *Terry* standard of investigative stops in crime-ridden inner city neighborhoods would not rid this Nation of discrimination, but would only result in increasing rates of criminal victimization of individuals belonging to a racial or ethnic minority in neighborhoods already plagued by high crime rates. The Court should reject that path.

CONCLUSION

For the foregoing reasons, *amici curiae* National Association of Police Organizations, Police Benevolent and Protective Association of Illinois, and Illinois Police Association urge the Court to validate the reasonableness of the investigative detention of the Respondent in this case and to uphold the constitutionality of the search and arrest of the Respondent, based on reasonable suspicion that the Respondent was engaged in criminal behavior. The Court's decision should be based on the Respondent's flight from the police or, alternatively, on both that flight and the his presence in a definite high crime area.

Therefore, *amici curiae* respectfully request that the Court reverse the judgment in this case of the Supreme Court of the State of Illinois.

Respectfully submitted this twenty-eighth day of June 1999,



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APPENDIX ONE

Annual Report 1997-Chicago Police Department *fig.6c-index crimes by police district*

Source: http://www.ci.chi.il.us/CommunityPolicing/Statistics/Reports/97AnnRprt/97CrimeTrends.pdf

District	murder	criminal sexual assault	robbery	aggrav. assault	burglary	theft	motor vehicle theft	arson	total
1	4	28	427	266	381	10,167	508	4	11,785
2	44	198	1,578	3,119	1,428	3,535	953	39	10,894
3	52	175	1,481	2,000	1,738	3,868	1,510	67	10,891
4	44	150	1,137	2,026	2,246	4,159	1,809	78	11,649
5	40	164	1,025	2,222	1,561	3,260	1,515	93	9,880
6	57	161	1,683	2,072	2,686	4,874	1,965	69	13,567
7	55	188	1,628	3,250	1,919	3,778	1,566	78	12,462
8	46	111	1,220	1,372	2,971	7,337	2,693	85	15,835
9	43	96	1,063	1,872	2,227	4,941	1,687	105	12,034
10	45	119	1,084	1,727	1,391	3,212	1,454	81	9,113
11	69	191	1,924	2,900	1,099	3,310	1,294	68	10,855
12	22	60	687	1,256	770	4,555	1,078	44	8,472
13	26	50	713	834	977	2,962	761	74	6,397
14	28	94	1,195	1,605	2,340	5,557	1,814	99	12,732
15	38	114	1,333	1,603	1,184	2,713	1,076	49	8,110
16	6	23	302	357	1,718	4,526	1,105	39	8,076
17	14	70	659	779	1,803	4,041	1,377	71	8,814
18	6	42	696	787	1,370	12,312	919	27	16,159
19	5	37	459	422	1,861	5,065	934	28	8,811
20	3	52	427	644	1,082	2,920	653	21	5,802
21	19	89	817	998	978	5,519	1,259	33	9,712
22	21	90	695	971	1,374	2,916	1,209	44	7,320
23	11	44	568	555	829	3,744	640	18	6,409
24	19	81	803	927	1,830	4,561	1,094	41	9,356
25	42	118	1,685	1,955	2,869	5,777	2,734	189	15,369
total	**759**	**2,545**	**25,289**	**36,519**	**40,632**	**119,609**	**33,607**	**1,544**	**260,504**

Note: Districts vary widely in geographic size and population. Therefore, direct district-to-district comparisons should be avoided.

APPENDIX TWO

1990 Population by Police District
Source: http://www.ci.chi.il.us/CommunityPolicing/Statistics/PopByDistrict.html

District	White	Black	Asian	Native Amer.	Other	Total*	Hispanic*
1	11,571	5,049	607	41	188	17,456	897
2	208	65,460	50	67	49	65,834	229
3	2,752	84,054	332	117	201	87,456	667
4	37,646	88,981	407	276	17,024	144,334	29,331
5	3,277	94,771	115	82	1,652	99,897	2,925
6	1,964	112,017	91	106	146	114,323	529
7	856	105,276	120	106	184	106,542	594
8	163,554	22,135	2,333	371	19,089	207,481	33,666
9	78,091	37,844	9,382	414	30,639	156,369	48,578
10	26,202	47,847	403	321	57,059	131,832	76,874
11	3,617	91,099	319	132	3,387	98,554	5,900
12	19,103	20,343	2,409	227	27,740	69,823	37,279
13	31,245	15,634	741	237	18,227	66,084	33,369
14	59,328	12,078	2,022	612	54,967	129,007	84,183
15	2,809	60,652	173	51	271	63,956	836
16	176,085	677	4,886	249	2,184	184,081	8,836
17	97,216	2,401	20,755	541	14,396	135,309	32,854
18	76,655	17,007	2,404	155	1,149	97,370	3,273
19	84,150	4,415	5,642	574	12,490	107,270	25,645
20	62,795	13,726	16,258	734	10,994	104,508	20,460
21	18,712	43,306	6,253	116	557	68,944	1,474
22	45,096	71,314	306	132	342	117,190	1,290
23	67,356	14,612	6,595	544	5,858	94,964	11,977
24	88,645	23,104	17,130	528	8,274	137,682	19,122
25	104,592	33,910	4,385	332	34,243	177,462	65,068
total	**1,263,524**	**1,087,711**	**104,118**	**7,064**	**321,309**	**2,783,726**	**545,852**
Percent	45.40%	39.10%	3.70%	0.30%	11.50%	100.00%	19.60%

* The "Hispanic" totals presented in the right-most column represent a duplicate count and should not be added to the "Total" column. Hispanics may be of any race, and are already included in the racial counts.

Data compiled by Wes Skogan, Northwestern University, for the Chicago Community Policing Evaluation Consortium, are based on 1990 Census figures.

Supreme Court, U.S.
FILED
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(9)

No. 98-1036

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF ILLINOIS,
Petitioner,

v.

WILLIAM WARDLOW,
aka SAM WARDLOW,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, COLORADO, DELAWARE, HAWAII, IDAHO, KANSAS, LOUISIANA, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

Ohio and the 16 other States joining in this brief, as guardians of public order within their respective jurisdictions, possess a profound and obvious interest in the question presented in this case: namely, whether police officers who patrol a high crime area may infer suspicion from a person's taking flight upon seeing the officers, so that a stop and frisk are justified pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). The States submit this brief to protect their authority, pursuant to their democratically accountable legislation, to adopt reasonable law enforcement practices that legitimately balance the interest in crime prevention against the privacy rights of individuals. The Illinois Supreme Court misinterpreted the Fourth Amendment to deny the states this reasonable democratic discretion, and that erroneous interpretation now needs to be corrected.

SUMMARY OF ARGUMENT

It is essential to note at the outset that this case presents neither the situation of someone merely present in a high crime area, *see Brown v. Texas*, 443 U.S. 47, 52 (1979) (fact of presence "in a neighborhood frequented by drug users, standing alone" was no "basis for concluding that appellant himself was engaged in criminal conduct"), nor the scenario of such a person merely running through the neighborhood.

Nor does this case even involve a genuine refusal to listen or answer an officer's inquiry, because Wardlow took flight upon realizing police presence in the vicinity long before any actual officer contact with him. Rather, this case presents officers patrolling an area where it is reasonable to suspect crime to occur, and where protecting the populace calls not only for stopping crime that is actually afoot, but also forestalling crime aborning.

Seeing someone flee upon recognizing police presence in such a neighborhood forms the basis for the officer's pursuit and *Terry* stop. The States urge that, under the *Terry* reasonable suspicion standard and the "totality of the circumstances" test, such pursuit and a brief stop are justified unless the defendant shows circumstances making it somehow unreasonable for an officer to find flight suspicious. In the last analysis, the Illinois Supreme Court did not appear to deny that flight could raise suspicion, but instead believed that flight is part of a "right of law-abiding citizens to eschew interactions with the police." J.A. 22, 701 N.E. 2d at 487. But no such right to flee emanates from the Fourth Amendment, as there is nothing unreasonable about stopping a person who runs from the police, especially in a neighborhood known for its criminal activities. Moreover, creating such a right to flee would extend too far the citizen's right to avoid interacting with police to the complete exclusion of the officer's duty to inquire into inherently suspicious circumstances.

In short, the *Terry* standard adequately protects Fourth Amendment values, and any further protection of citizens' rights during police encounters can safely and properly be left to State and local law.

ARGUMENT

I. In A High Crime Area, A Person's Flight Upon Sight Of A Police Officer Arouses Reasonable Suspicion And Justifies A *Terry* Stop.

A. In attempting to apply the *Terry* requirement of reasonable suspicion, the Illinois Supreme Court cited this Court's decision in *Florida v. Royer*, 460 U.S. 491 (1983), for the proposition that a citizen "may decline to listen to the

[officer's] questions and simply go on his or her way" and that "refusal to listen or answer does not, without more, furnish [reasonable, objective] grounds" for detention. J.A. 21, 701 N.E.2d at 487. In the lower court's view, "*Terry* and *Royer* stand for the proposition that exercise of this constitutional right [*i.e.*, the freedom to 'move on'] may not itself provide the basis for more intrusive police activity." *Id.* That proposition, in turn, ostensibly underpins the Illinois Supreme Court's holding.

The *amici* States do not disagree that, in the context of encounters between citizens and police officers, the officers in the street have a general power to inquire of citizens, and citizens in turn have a general prerogative to decline to converse or cooperate with such inquiry. Those concommitant privileges have been repeatedly acknowledged and endorsed by this Court at the latest from *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). In urging that police be permitted to regard flight as a suspicious circumstance, the States ask only that the ordinary *Terry* doctrine of reasonable suspicion be applied in a straightforward manner. The States do not ask anything beyond what *Terry* provides; namely, a balance that permits, in a high crime area, officers to stop and inquire when a person flees upon sight of the police.

Specifically *not* requested in this case is that flight in a high crime neighborhood be somehow deemed to constitute probable cause sufficient to justify arrest and a full search. Nor do the States maintain that furtive movements such as flight could authorize police to intrude upon protected privacy zones such as the home—a person who manages to flee from the street into his house or apartment, for example, is ordinarily free of police following him inside, and he cannot be rousted out merely to answer questions without more—*i.e.*, without other circumstances amounting to probable

cause, *see Wong Sun v. United States*, 371 U.S. 471, 483 (1963).

That said, however, we note that the Illinois Supreme Court's citation to the reciprocal prerogatives of the police and the citizen during a street encounter forms no sufficient basis for the lower court's holding. That is so, because this case simply does not present a "refusal to listen or answer." Instead, it presents the very different circumstance of an affirmative act of fleeing upon the mere recognition that police officers are in the vicinity. No words were, in this case, initially directed by Officer Nolan at Wardlow to which Wardlow could have "listened" or furnished an "answer." Nothing said or done by police created a choice for Wardlow whether to voluntarily cooperate or voluntarily "move on" instead. As a result, the issue of when the citizen chooses to act voluntarily "in a spirit of apparent cooperation" and when the citizen is surrendering to a show of authority, *Mendenhall*, 446 U.S. at 553, simply does not arise on this record.

Accordingly, there is no need on the particular facts presented here to extend any special judicial protection to the freedom to move away, because the freedom to move away from an inquiring officer is not directly implicated here. What this record presents is flight upon learning police are present in the vicinity, which is known to be a high crime area. That is a suspicious circumstance that merits inquiry by police.

B. This Court in *Royer* said that "refusal to listen or answer does not, *without more*, furnish [objective, reasonable] grounds" for detention, 460 U.S. at 498 (emphasis added). Quite simply: flight is "more" than mere refusal to listen or answer. Where, as here, flight appears to result from a potential suspect's becoming aware of police presence in the vicinity, suspicion is particularly well founded in reason. For

fleeing on the street can reasonably be inferred to constitute an affirmative act to conceal one's person—and anything on one's person—from ordinary scrutiny in a public place. A potential suspect with a guilty conscience may or may not know the police have independent information tying her to particular crimes; but when the officer shows up, the citizen does not want to stay to find out—she runs. On the other hand, the citizen without the guilty conscience may desire to avoid interacting with police, so she declines to listen to, or to answer, police questions and walks on—but typically she does not undertake the additional exertion of running, because in her understanding there is no illegal conduct to which the officer could tie her.

Accordingly, flight in the context of police encounters in the street legitimately raises suspicion as a general proposition. *Accord* 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.4(f) (1996), at 176 ("It is not to be doubted that [flight and other furtive reactions to police presence] may be taken into account by the police and that together with other suspicious circumstances these reactions may well justify a stopping for investigation.").

Moreover, flight has historically been recognized as supplying an increment of evidence of guilt to the extent it shows consciousness of guilt. *See Allen v. United States*, 164 U.S. 492, 498-99 (1896) (noting "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt"); *Alberty v. United States*, 162 U.S. 499, 508-10 (1896); *Hickory v. United States*, 160 U.S. 408, 422 (1896). *See also California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) (dicta); C. Hobson, *Flight and* Terry*: Providing the Necessary Bright Line*, 3 Md. J. Contemp. Legal Issues 119, 123-26 (1992); 2 J. Wigmore, *Evidence* §276 (Chadbourne rev. 1979), at 122 *et seq.* Historically, the main objection

against such evidence has been the possibility of innocent alternative explanation (or, in some cases, the guilty alternative of fleeing because of some crime other than the one charged). *Cf. Alberty*, 162 U.S. at 510 (noting that "there are so many reasons for such conduct consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give such weight as it deserves"). But the general admissibility of flight evidence in conjunction with other evidence of guilt shows that courts have regarded fleeing as manifesting a guilty mind, an inference that police could also reasonably draw during a street encounter in concluding flight was suspicious. Indeed, as Illinois argues more fully, so strong was the inference of guilt from flight at the time the Fourth Amendment was promulgated, that a powerful historical basis exists for concluding the Fourth Amendment inherently incorporates the Framers' judgment that flight from officers forms a reasonable basis for search and seizure, *see Wyoming v. Houghton*, 119 S.Ct. 1297, 1300 (1999) (first Fourth Amendment inquiry is "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed"); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (looking to "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing").

This Court's decision in *Wong Sun v. United States*, 371 U.S. 471, 483 (1963) is not to the contrary, because the Court there considered whether *probable cause* could be inferred primarily or solely from the accused's flight from an officer at the door to his business and residence. Because of its inherent ambiguities, flight alone could not be deemed sufficient to support probable cause. By contrast, this case involves the lesser standard of reasonable suspicion, not probable cause.

C. The foregoing analysis does not suggest that fleeing from police always and everywhere justifies a *Terry* stop. The *Terry* reasonableness standard turns upon examination of "the totality of the circumstances—the whole picture." *United States v. Sokolow*, 490 U.S. 1, 8 (1989), citing *United States v. Cortez*, 449 U.S. 411, 417 (1981). Relevant circumstances in the present case certainly include the context of investigatory activity of officers in a high crime area. Additionally, were it so, it would also be relevant if the officer had reason to know beforehand of an innocent reason underlying the respondent's flight.

Surely in most instances fleeing upon learning of police presence in the vicinity legitimately raises suspicion, and therefore a presumption of reasonable suspicion is warranted—subject to rebuttal by showing the officer knew about an innocent explanation for flight. If specific information at the time of flight and pursuit negates suspicion, and if the officer knows or should know such information, the criminal defendant can still prove those circumstances and invoke his or her Fourth Amendment rights.

In this regard, it is crucial to observe that reasonableness must be judged from the standpoint of the officer, and what the officer knows or ought to know. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether, *viewed from the standpoint of an objectively reasonable police officer*, they amount to reasonable suspicion or to probable cause"); *Terry*, 392 U.S. at 21-22 (standard of reasonableness: "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was

appropriate"). Accordingly, unless the officer is aware of the innocent explanation ahead of time, the innocent explanation itself does not remove justification for the stop—indeed, seeking that very explanation ordinarily constitutes the main legitimate reason for stopping the person in flight to inquire.

II. Police Inquiry Into Suspicious Circumstances, Which Include Fleeing Upon Seeing The Police, Is Fully Consistent With 'The Concept Of Ordered Liberty,' And Accordingly A Person Who Takes Flight Has No Fundamental Right To Flee.

A. In urging the Court to uphold the constitutionality of the police practice in this factual context, the States in no way disparage the right to be free of unreasonable searches and seizures. This right, explicit in the Fourth Amendment, applies to the States through Section 1 of the Fourteenth Amendment: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

Twelve years after *Wolf* acknowledged incorporation of the Fourth Amendment, the Court took the additional step of importing the exclusionary rule as a means to redress violations of this right. *Mapp v. Ohio*, 367 U.S. 643 (1961). At no time in the subsequent history of Fourth Amendment incorporation into the Fourteenth Amendment has the Court retreated from the basic rationale that unreasonable searches and seizures upset the balance between order and liberty, and thereby violate the most fundamental norms of a free society. The question in the subsequent cases concerns the precise requirements of Fourth Amendment reasonableness. But underlying that inquiry is the more basic issue of how much

the Fourteenth Amendment limits the democratic discretion of State governments. While the States undeniably should be bound to respect the basic right of all Americans to be free from unjustified police intrusion into their private affairs, the Constitution should not be interpreted to prevent State and local officers from reasonable law enforcement practices pursuant to their authority under democratically approved state laws.

B. The Illinois Supreme Court's decision in this case departs from the fundamental balance between order and liberty. Far from imposing the basic nationwide norm of reasonable suspicion, the Illinois Supreme Court decided to regard fleeing at the sight of police as part of "the right of law-abiding citizens to eschew interactions with the police," J.A. 22, 701 N.E.2d at 487. This determination, like any proposed Fourth Amendment principle said to be incorporated into the Fourteenth Amendment, should be measured against the standard of whether such principle constitutes a necessary part of, or corollary to, that degree of freedom from police intrusion which is 'implicit in the concept of ordered liberty.'

In other words, the question here should be: Does the very concept of ordered liberty demand that a citizen be free to flee upon recognizing that police are present, without being subject to a brief stop and interview concerning the grounds for her flight? The *amici* States maintain that it does ***not***—that in fact the concept of ordered liberty is far more consistent with an officer's reasonable action in inquiring into genuinely suspicious circumstances (which, as previously discussed, include flight from the police) rather than in recognizing a blanket privilege to flee with no official consequence.

Indeed, it is difficult to see how liberty - that is 'ordered'—as opposed to the empty, illusory 'liberty' of the state of anarchy—can be reconciled with requiring officers to ignore inherently suspicious acts. As this Court has trenchantly observed, "[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses," *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy"). Maintaining public order is what policing ought to be about, because that order forms the very basis for liberty in the meaningful sense. Inquiring into suspicious conduct, in turn, constitutes an important aspect of maintaining order.

The Court in *Terry* explicitly tied the reasonable suspicion standard to the need for "effective crime prevention and detection," 392 U.S. at 22, and the recent emphasis on community policing and order maintenance has only served to make *Terry's* logic more compelling than ever. *See* D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 582-82 (1997) (citing empirical research supporting the 'broken windows' thesis that unremediated disorder leads to greater disorder and crime). As one leading commentator has noted, "the argument the police must have some additional power to make seizures beyond that conferred by the pre-*Terry* law of arrests is most compelling when stated in terms of the crime-prevention function." 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §9.2(a) (1996).

C. Finally, the lower court's citation to *Chicago v. Morales*, 687 N.E.2d 53 (1997), *aff'd*, 67 U.S.L.W. 4415, 119 S.Ct. 1849 (June 10, 1999), is not availing. This Court's

decision in *Morales* upheld the Illinois Supreme Court's finding that Chicago's ordinance authorizing police to issue gang dispersal orders was unconstitutionally vague. A majority of this Court found that the substantive prohibition of gang loitering reached so broadly that police were granted an excessively wide and uncontrolled discretion, while citizens were too little apprised by the law of their obligations. As a result, police orders under the Chicago ordinance were invalid.

The issue here has nothing to do with a vague ordinance, or with police discretion to participate in defining a crime or determining what constitutes criminal activity. Instead, this case concerns the suspiciousness of flight as a basis for investigatory stop, which is subject to judicial review in determining whether the exclusionary rule applies. Because *Morales* does not address the latter question, that case simply does not control here.

III. The Fourth Amendment Should Not Be Read To Create A Special Privilege To Engage In Suspicious Conduct Such As Flight, Because No Such Privileges Are Necessary To Protect Fourth Amendment Privacy And Security Interests.

In essence, the lower court converted this Court's observation that a citizen may refuse to listen to and answer police questions and may simply "move on" into a new species of fundamental right, and further hypothesized that permitting police to infer suspicion from flight would infringe that asserted right. But the lower court was wrong for two main reasons.

First, no privilege to flee is necessary to preserve the liberties of the citizen, because the *Terry* standard adequately does that all by itself. Fourth Amendment reasonableness is

not an all-or-nothing proposition. Officers must carefully tailor the degree of intrusion against protected security and privacy interests to the degree of suspicion, *see Royer*, 460 U.S. at 500 (scope of both a search or a seizure on less than probable cause must be "strictly tied to and justified by the circumstances which rendered its initiation permissible").

Terry's companion case, *Sibron v. New York*, 392 U.S. 40 (1968), well illustrates the point: the intrusive pocket-search of Sibron was wholly unjustified by the quantum of reasonable suspicion the officer could have harbored under the total circumstances, 392 U.S. at 65 (search "not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man"). By contrast, the search of the suspect Peters was justified as being incident to an arrest that itself was supported by probable cause that arose from Peters' presence as a stranger on the residential premises, his furtive movements, and his flight upon hearing the officer's apartment door slam, 392 U.S. at 66.

Flight alone typically will not justify a general search of the person or the person's house or effects, but only a brief investigatory stop and where appropriate, a pat down. Additional search activity must ordinarily await a warrant issued upon probable cause, *see Sokolow*, 490 U.S. at 7 (after drug-sniffing dog alerted on luggage, passenger was properly detained while warrant was obtained for search of luggage). This proportionality principle adequately safeguards security and privacy interests by assuring a low level of suspicion can never authorize broad intrusion into one's person, house, papers or effects. It also decisively distinguishes *Wong Sun v. United States*, 371 U.S. 471, 483 (1963): in that case, police attempted to use the accused's flight into his own family residence to justify unconsented entry into the residence, a

search, and an arrest. Mere flight could not suffice to support probable cause to so invade the accused's security and privacy interests; but here, suspicion based on flight can justify a *Terry* stop on the public streets.

By limiting the degree of intrusion authorized by suspicious flight, the *Terry* doctrine cabins police abuses and sufficiently maintains security and privacy interests. Accordingly, no prophylactic privilege to flee is necessary.

Second, the lower court's analysis excessively favors one side of the citizen/police encounter to the exclusion of the legitimate prerogatives of the other. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets," *United States v. Mendenhall*, 446 U.S. 544, 553 (1980), because "[p]olice officers enjoy 'the liberty ... to address questions to other persons,'" *id.* Corollary to this general prerogative to inquire, which calls for no Fourth Amendment scrutiny, is the prerogative of the "person addressed ... to ignore his interrogator and walk away." *Id.* But when a person excites legitimate suspicion by taking flight at the mere presence of police, the officer is typically deprived of any opportunity to seek an explanation of that suspicious activity without a stop. By positing a privilege to flee, the lower court overprotects the "right to move on" and destroys any meaningful power of the police to exercise their reasonable prerogative to ask for an explanation of the circumstances for flight.

By contrast, permitting the officer to stop and inquire does not genuinely impair the legitimate right to refuse to answer, because the fleeing person can still decline to cooperate after he or she has been stopped and inquiry has been made. The cause of both order and liberty is furthered by permitting the police to seek the explanation for flight, whether innocent or culpable, through a brief *Terry* stop.

CONCLUSION

The decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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No. 98-1036

IN THE SUPREME COURT OF THE UNITED S

October Term, 1998

STATE OF ILLINOIS,
Petitioner,

v.

WILLIAM WARDLOW,
aka SAM WARDLOW,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, COLORADO, DELAWARE, HAWAII, IDAHO, KANSAS, LOUISIANA, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

Ohio and the 16 other States joining in this brief, as guardians of public order within their respective jurisdictions, possess a profound and obvious interest in the question presented in this case: namely, whether police officers who patrol a high crime area may infer suspicion from a person's taking flight upon seeing the officers, so that a stop and frisk are justified pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). The States submit this brief to protect their authority, pursuant to their democratically accountable legislation, to adopt reasonable law enforcement practices that legitimately balance the interest in crime prevention against the privacy rights of individuals. The Illinois Supreme Court misinterpreted the Fourth Amendment to deny the states this reasonable democratic discretion, and that erroneous interpretation now needs to be corrected.

SUMMARY OF ARGUMENT

It is essential to note at the outset that this case presents neither the situation of someone merely present in a high crime area, *see Brown v. Texas*, 443 U.S. 47, 52 (1979) (fact of presence "in a neighborhood frequented by drug users, standing alone" was no "basis for concluding that appellant himself was engaged in criminal conduct"), nor the scenario of such a person merely running through the neighborhood.

Nor does this case even involve a genuine refusal to listen or answer an officer's inquiry, because Wardlow took flight upon realizing police presence in the vicinity long before any actual officer contact with him. Rather, this case presents officers patrolling an area where it is reasonable to suspect crime to occur, and where protecting the populace calls not only for stopping crime that is actually afoot, but also forestalling crime aborning.

Seeing someone flee upon recognizing police presence in such a neighborhood forms the basis for the officer's pursuit and *Terry* stop. The States urge that, under the *Terry* reasonable suspicion standard and the "totality of the circumstances" test, such pursuit and a brief stop are justified unless the defendant shows circumstances making it somehow unreasonable for an officer to find flight suspicious. In the last analysis, the Illinois Supreme Court did not appear to deny that flight could raise suspicion, but instead believed that flight is part of a "right of law-abiding citizens to eschew interactions with the police." J.A. 22, 701 N.E. 2d at 487. But no such right to flee emanates from the Fourth Amendment, as there is nothing unreasonable about stopping a person who runs from the police, especially in a neighborhood known for its criminal activities. Moreover, creating such a right to flee would extend too far the citizen's right to avoid interacting with police to the complete exclusion of the officer's duty to inquire into inherently suspicious circumstances.

In short, the *Terry* standard adequately protects Fourth Amendment values, and any further protection of citizens' rights during police encounters can safely and properly be left to State and local law.

ARGUMENT

I. In A High Crime Area, A Person's Flight Upon Sight Of A Police Officer Arouses Reasonable Suspicion And Justifies A *Terry* Stop.

A. In attempting to apply the *Terry* requirement of reasonable suspicion, the Illinois Supreme Court cited the plurality opinion from this Court's decision in *Florida v. Royer*, 460 U.S. 491 (1983), for the proposition that a citizen

"may decline to listen to the [officer's] questions and simply go on his or her way" and that "refusal to listen or answer does not, without more, furnish [reasonable, objective] grounds" for detention. J.A. 21, 701 N.E.2d at 487. In the lower court's view, "*Terry* and *Royer* stand for the proposition that exercise of this constitutional right [*i.e.*, the freedom to 'move on'] may not itself provide the basis for more intrusive police activity." *Id.* That proposition, in turn, ostensibly underpins the Illinois Supreme Court's holding.

The *amici* States do not disagree that, in the context of encounters between citizens and police officers, the officers in the street have a general power to inquire of citizens, and citizens in turn have a general prerogative to decline to converse or cooperate with such inquiry. Those concomitant privileges have been repeatedly acknowledged and endorsed by a plurality of this Court at the latest from *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). In urging that police be permitted to regard flight as a suspicious circumstance, the States ask only that the ordinary *Terry* doctrine of reasonable suspicion be applied in a straightforward manner. The States do not ask anything beyond what *Terry* provides; namely, a balance that permits, in a high crime area, officers to stop and inquire when a person flees upon sight of the police.

Specifically *not* requested in this case is that flight in a high crime neighborhood be somehow deemed to constitute probable cause sufficient to justify arrest and a full search. Nor do the States maintain that furtive movements such as flight could authorize police to intrude upon protected privacy zones such as the home—a person who manages to flee from the street into his house or apartment, for example, is ordinarily free of police following him inside, and he cannot be rousted out merely to answer questions without more—*i.e.*, without other circumstances amounting to probable

cause, *see Wong Sun v. United States*, 371 U.S. 471, 483 (1963).

That said, however, we note that the Illinois Supreme Court's citation to the reciprocal prerogatives of the police and the citizen during a street encounter forms no sufficient basis for the lower court's holding. That is so, because this case simply does not present a "refusal to listen or answer." Instead, it presents the very different circumstance of an affirmative act of fleeing upon the mere recognition that police officers are in the vicinity. No words were, in this case, initially directed by Officer Nolan at Wardlow to which Wardlow could have "listened" or furnished an "answer." Nothing said or done by police created a choice for Wardlow whether to voluntarily cooperate or voluntarily "move on" instead. As a result, the issue of when the citizen chooses to act voluntarily "in a spirit of apparent cooperation" and when the citizen is surrendering to a show of authority, *Mendenhall*, 446 U.S. at 553, simply does not arise on this record.

Accordingly, there is no need on the particular facts presented here to extend any special judicial protection to the freedom to move away, because the freedom to move away from an inquiring officer is not directly implicated here. What this record presents is flight upon learning police are present in the vicinity, which is known to be a high crime area. That is a suspicious circumstance that merits inquiry by police.

B. A plurality of this Court in *Royer* said that "refusal to listen or answer does not, *without more*, furnish [objective, reasonable] grounds" for detention, 460 U.S. at 498 (emphasis added). Quite simply: flight is "more" than mere refusal to listen or answer. Where, as here, flight appears to result from a potential suspect's becoming aware of police presence in the vicinity, suspicion is particularly well founded

in reason. For fleeing on the street can reasonably be inferred to constitute an affirmative act to conceal one's person—and anything on one's person—from ordinary scrutiny in a public place. A potential suspect with a guilty conscience may or may not know the police have independent information tying her to particular crimes; but when the officer shows up, the citizen does not want to stay to find out—she runs. On the other hand, the citizen without the guilty conscience may desire to avoid interacting with police, so she declines to listen to, or to answer, police questions and walks on—but typically she does not undertake the additional exertion of running, because in her understanding there is no illegal conduct to which the officer could tie her.

Accordingly, flight in the context of police encounters in the street legitimately raises suspicion as a general proposition. *Accord* 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.4(f) (1996), at 176 ("It is not to be doubted that [flight and other furtive reactions to police presence] may be taken into account by the police and that together with other suspicious circumstances these reactions may well justify a stopping for investigation.").

Moreover, flight has historically been recognized as supplying an increment of evidence of guilt to the extent it shows consciousness of guilt. *See Allen v. United States*, 164 U.S. 492, 498-99 (1896) (noting "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt"); *Alberty v. United States*, 162 U.S. 499, 508-10 (1896); *Hickory v. United States*, 160 U.S. 408, 422 (1896). *See also California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) (dicta); C. Hobson, *Flight and* Terry*: Providing the Necessary Bright Line*, 3 Md. J. Contemp. Legal Issues 119, 123-26 (1992); 2 J. Wigmore, *Evidence* §276 (Chadbourne rev. 1979), at 122 *et seq.* Historically, the main objection

against such evidence has been the possibility of innocent alternative explanation (or, in some cases, the guilty alternative of fleeing because of some crime other than the one charged). *Cf. Alberty*, 162 U.S. at 510 (noting that "there are so many reasons for such conduct consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give such weight as it deserves"). But the general admissibility of flight evidence in conjunction with other evidence of guilt shows that courts have regarded fleeing as manifesting a guilty mind, an inference that police could also reasonably draw during a street encounter in concluding flight was suspicious. Indeed, as Illinois argues more fully, so strong was the inference of guilt from flight at the time the Fourth Amendment was promulgated, that a powerful historical basis exists for concluding the Fourth Amendment inherently incorporates the Framers' judgment that flight from officers forms a reasonable basis for search and seizure, *see Wyoming v. Houghton*, 119 S.Ct. 1297, 1300 (1999) (first Fourth Amendment inquiry is "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed"); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (looking to "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing").

This Court's decision in *Wong Sun v. United States*, 371 U.S. 471, 483 (1963) is not to the contrary, because the Court there considered whether *probable cause* could be inferred primarily or solely from the accused's flight from an officer at the door to his business and residence. Because of its inherent ambiguities, flight alone could not be deemed sufficient to support probable cause. By contrast, this case involves the lesser standard of reasonable suspicion, not probable cause.

C. The foregoing analysis does not suggest that fleeing from police always and everywhere justifies a *Terry* stop. The *Terry* reasonableness standard turns upon examination of "the totality of the circumstances—the whole picture." *United States v. Sokolow*, 490 U.S. 1, 8 (1989), citing *United States v. Cortez*, 449 U.S. 411, 417 (1981). Relevant circumstances in the present case certainly include the context of investigatory activity of officers in a high crime area. Additionally, were it so, it would also be relevant if the officer had reason to know beforehand of an innocent reason underlying the respondent's flight.

Surely in most instances fleeing upon learning of police presence in the vicinity legitimately raises suspicion, and therefore a presumption of reasonable suspicion is warranted—subject to rebuttal by showing the officer knew about an innocent explanation for flight. If specific information at the time of flight and pursuit negates suspicion, and if the officer knows or should know such information, the criminal defendant can still prove those circumstances and invoke his or her Fourth Amendment rights.

In this regard, it is crucial to observe that reasonableness must be judged from the standpoint of the officer, and what the officer knows or ought to know. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether, *viewed from the standpoint of an objectively reasonable police officer*, they amount to reasonable suspicion or to probable cause"); *Terry*, 392 U.S. at 21-22 (standard of reasonableness: "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was

appropriate"). Accordingly, unless the officer is aware of the innocent explanation ahead of time, the innocent explanation itself does not remove justification for the stop—indeed, seeking that very explanation ordinarily constitutes the main legitimate reason for stopping the person in flight to inquire.

II. Police Inquiry Into Suspicious Circumstances, Which Include Fleeing Upon Seeing The Police, Is Fully Consistent With 'The Concept Of Ordered Liberty,' And Accordingly A Person Who Takes Flight Has No Fundamental Right To Flee.

A. In urging the Court to uphold the constitutionality of the police practice in this factual context, the States in no way disparage the right to be free of unreasonable searches and seizures. This right, explicit in the Fourth Amendment, applies to the States through Section 1 of the Fourteenth Amendment: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

Twelve years after *Wolf* acknowledged incorporation of the Fourth Amendment, the Court took the additional step of importing the exclusionary rule as a means to redress violations of this right. *Mapp v. Ohio*, 367 U.S. 643 (1961). At no time in the subsequent history of Fourth Amendment incorporation into the Fourteenth Amendment has the Court retreated from the basic rationale that unreasonable searches and seizures upset the balance between order and liberty, and thereby violate the most fundamental norms of a free society. The question in the subsequent cases concerns the precise requirements of Fourth Amendment reasonableness. But underlying that inquiry is the more basic issue of how much

the Fourteenth Amendment limits the democratic discretion of State governments. While the States undeniably should be bound to respect the basic right of all Americans to be free from unjustified police intrusion into their private affairs, the Constitution should not be interpreted to prevent State and local officers from reasonable law enforcement practices pursuant to their authority under democratically approved state laws.

B. The Illinois Supreme Court's decision in this case departs from the fundamental balance between order and liberty. Far from imposing the basic nationwide norm of reasonable suspicion, the Illinois Supreme Court decided to regard fleeing at the sight of police as part of "the right of law-abiding citizens to eschew interactions with the police," J.A. 22, 701 N.E.2d at 487. This determination, like any proposed Fourth Amendment principle said to be incorporated into the Fourteenth Amendment, should be measured against the standard of whether such principle constitutes a necessary part of, or corollary to, that degree of freedom from police intrusion which is 'implicit in the concept of ordered liberty.'

In other words, the question here should be: Does the very concept of ordered liberty demand that a citizen be free to flee upon recognizing that police are present, without being subject to a brief stop and interview concerning the grounds for her flight? The *amici* States maintain that it does ***not***—that in fact the concept of ordered liberty is far more consistent with an officer's reasonable action in inquiring into genuinely suspicious circumstances (which, as previously discussed, include flight from the police) rather than in recognizing a blanket privilege to flee with no official consequence.

Indeed, it is difficult to see how liberty that is 'ordered'—as opposed to the empty, illusory 'liberty' of the state of anarchy—can be reconciled with requiring officers to ignore inherently suspicious acts. As this Court has trenchantly observed, "[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses," *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy"). Maintaining public order is what policing ought to be about, because that order forms the very basis for liberty in the meaningful sense. Inquiring into suspicious conduct, in turn, constitutes an important aspect of maintaining order.

The Court in *Terry* explicitly tied the reasonable suspicion standard to the need for "effective crime prevention and detection," 392 U.S. at 22, and the recent emphasis on community policing and order maintenance has only served to make *Terry's* logic more compelling than ever. *See* D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 582-82 (1997) (citing empirical research supporting the 'broken windows' thesis that unremediated disorder leads to greater disorder and crime). As one leading commentator has noted, "the argument the police must have some additional power to make seizures beyond that conferred by the pre-*Terry* law of arrests is most compelling when stated in terms of the crime-prevention function." 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §9.2(a) (1996).

C. Finally, the lower court's citation to *Chicago v. Morales*, 687 N.E.2d 53 (1997), *aff'd*, 67 U.S.L.W. 4415, 119 S.Ct. 1849 (June 10, 1999), is not availing. This Court's

decision in *Morales* upheld the Illinois Supreme Court's finding that Chicago's ordinance authorizing police to issue gang dispersal orders was unconstitutionally vague. A majority of this Court found that the substantive prohibition of gang loitering reached so broadly that police were granted an excessively wide and uncontrolled discretion, while citizens were too little apprised by the law of their obligations. As a result, police orders under the Chicago ordinance were invalid.

The issue here has nothing to do with a vague ordinance, or with police discretion to participate in defining a crime or determining what constitutes criminal activity. Instead, this case concerns the suspiciousness of flight as a basis for investigatory stop, which is subject to judicial review in determining whether the exclusionary rule applies. Because *Morales* does not address the latter question, that case simply does not control here.

III. The Fourth Amendment Should Not Be Read To Create A Special Privilege To Engage In Suspicious Conduct Such As Flight, Because No Such Privileges Are Necessary To Protect Fourth Amendment Privacy And Security Interests.

In essence, the lower court converted this Court's plurality observation that a citizen may refuse to listen to and answer police questions and may simply "move on" into a new species of fundamental right, and further hypothesized that permitting police to infer suspicion from flight would infringe that asserted right. But the lower court was wrong for two main reasons.

First, no privilege to flee is necessary to preserve the liberties of the citizen, because the *Terry* standard adequately does that all by itself. Fourth Amendment reasonableness is

not an all-or-nothing proposition. Officers must carefully tailor the degree of intrusion against protected security and privacy interests to the degree of suspicion, *see Royer*, 460 U.S. at 500 (scope of both a search or a seizure on less than probable cause must be "strictly tied to and justified by the circumstances which rendered its initiation permissible" [internal cite omitted]).

Terry's companion case, *Sibron v. New York*, 392 U.S. 40 (1968), well illustrates the point: the intrusive pocket-search of Sibron was wholly unjustified by the quantum of reasonable suspicion the officer could have harbored under the total circumstances, 392 U.S. at 65 (search "not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man"). By contrast, the search of the suspect Peters was justified as being incident to an arrest that itself was supported by probable cause that arose from Peters' presence as a stranger on the residential premises, his furtive movements, and his flight upon hearing the officer's apartment door slam, 392 U.S. at 66.

Flight alone typically will not justify a general search of the person or the person's house or effects, but only a brief investigatory stop and where appropriate, a pat down. Additional search activity must ordinarily await a warrant issued upon probable cause, *see Sokolow*, 490 U.S. at 7 (after drug-sniffing dog alerted on luggage, passenger was properly detained while warrant was obtained for search of luggage). This proportionality principle adequately safeguards security and privacy interests by assuring a low level of suspicion can never authorize broad intrusion into one's person, house, papers or effects. It also decisively distinguishes *Wong Sun v. United States*, 371 U.S. 471, 483 (1963): in that case, police attempted to use the accused's flight into his own family

residence to justify unconsented entry into the residence, a search, and an arrest. Mere flight could not suffice to support probable cause to so invade the accused's security and privacy interests; but here, suspicion based on flight can justify a *Terry* stop on the public streets.

By limiting the degree of intrusion authorized by suspicious flight, the *Terry* doctrine cabins police abuses and sufficiently maintains security and privacy interests. Accordingly, no prophylactic privilege to flee is necessary.

Second, the lower court's analysis excessively favors one side of the citizen/police encounter to the exclusion of the legitimate prerogatives of the other. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets," *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (plurality opinion per Stewart, J.) because "[p]olice officers enjoy 'the liberty ... to address questions to other persons," *id.* Corollary to this general prerogative to inquire, which calls for no Fourth Amendment scrutiny, is the prerogative of the "person addressed ... to ignore his interrogator and walk away." *Id.* But when a person excites legitimate suspicion by taking flight at the mere presence of police, the officer is typically deprived of any opportunity to seek an explanation of that suspicious activity without a stop. By positing a privilege to flee, the lower court overprotects the "right to move on" and destroys any meaningful power of the police to exercise their reasonable prerogative to ask for an explanation of the circumstances for flight.

By contrast, permitting the officer to stop and inquire does not genuinely impair the legitimate right to refuse to answer, because the fleeing person can still decline to cooperate after he or she has been stopped and inquiry has been made. The cause of both order and liberty is furthered

by permitting the police to seek the explanation for flight, whether innocent or culpable, through a brief *Terry* stop.

CONCLUSION

The decision of the Illinois Supreme Court should be reversed.

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STATE OF ILLINOIS,

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—v.—

SAM WARDLOW,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense Fund (LDF) was chartered in 1939 for the purpose of, *inter alia*, rendering legal services free of charge to "indigent Negroes suffering injustice on the basis of race or color." Its first Director-Counsel was Thurgood Marshall. *See generally NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has developed a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

Since its inception, the Legal Defense Fund has sought to eradicate the race discrimination that has long infected our Nation's criminal justice system and has called attention to the corrosive effects that such bias has on cherished norms of equal citizenship. *Swain v. Alabama*, 380 U.S. 202 (1965); *Turner v. Fouche*, 396 U.S. 346 (1970); *Batson v. Kentucky*, 486 U.S. 79 (1986). Specifically, LDF has participated, as both counsel of record and *amicus curiae*, in landmark cases of this Court announcing the constitutional standards governing police-citizen encounters. *See, e.g, Terry v. Ohio*, 392 U.S. 1 (1968); *Tennessee v. Garner*, 471 U.S 1 (1985). In each, LDF sought to ensure that the Court's resolution of the Fourth Amendment issues presented was informed by a full and realistic understanding of the costs of unchecked police discretion. Not only will the harms of unconstitutional police conduct be borne disproportionately by members of groups historically singled out for unequal treatment, but such practices are particularly subversive of the police-citizen trust that is indispensable both

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[1] This brief was prepared by counsel of record for *amicus*, with significant and dedicated assistance from summer intern Kara Finck. No party or third party made any financial contribution in support of these efforts.

to effective law enforcement and to full and equal civic participation.

These concerns are squarely implicated in this case. At precisely the juncture that local, State, and federal governments are beginning to document and come to terms with the pervasiveness of unjustifiable, race-based police misconduct — ranging from harassment to use of undue and even lethal force — the State of Illinois and its various *amici* insist that the Court should pronounce flight from the police sufficient in itself to establish reasonable suspicion as a matter of law. As a matter of Fourth Amendment doctrine and empirical reality, there can be no equating the numerous and specific indicia of criminal activity held sufficient in *Terry* to overcome the Constitution's protections against seizures by the police, and the conduct here, which is wholly — and regrettably — consistent with what may be expected of law-abiding individuals in areas where mistrust and apprehension of the police run high.

The weakening of the *Terry* standard prayed for by Petitioners here would deal a serious blow to the efforts of the Legal Defense Fund and other civil rights organization to eradicate race-based police practices and to assure that the full range of constitutional rights are enjoyed no less in our nation's inner cities and "high crime" areas than in its "low crime" enclaves.

STATEMENT OF THE CASE

In the late morning of Saturday, September 9, 1995, four cars, each carrying two uniformed police officers, were driving in tandem through Chicago's 11th District. The officers were neither responding to a report or tip of criminal activity, nor searching for a particular suspect. Officer Timothy Nolan, riding in the last car, saw Sam Wardlow, a middle-aged African-American male, standing on the street corner holding a white

bag. Officer Nolan did not know Wardlow and testified at the suppression hearing that Wardlow was not violating any law or regulation at that time. JA-5. After looking in the police officer's direction, Wardlow began to run. JA-6. Officer Nolan immediately gave chase, during which he failed either to identify himself or to command Wardlow to stop. Prior to catching Wardlow, he did not see Wardlow make any effort to conceal or to hide anything. When he reached Wardlow, Nolan stopped him and immediately conducted a pat-down search of his person and bag. Upon feeling the outside of Wardlow's bag, Nolan believed it contained a weapon. A search of the bag revealed a .38 caliber revolver, and Wardlow was placed under arrest.

The trial court denied the motion to suppress, and after a stipulated bench trial, found Wardlow guilty of unlawful possession of a weapon by a felon. Wardlow was sentenced to two years in the Illinois Department of Corrections. The Illinois Court of Appeals reversed the conviction, concluding that the stop and frisk violated this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). *People v. Wardlow*, 678 N.E.2d. 65 (Ill. App. 1997). That court determined that the ambiguous nature of flight did not rise to the level of reasonable suspicion required to justify the officer's action. *Id.* at 68. It did not base its decision on Wardlow's presence in a high-crime area because it concluded that the evidence of the location was too vague to support a determination of a particular and localized high crime area. *Id.* at 67. The Illinois Supreme Court affirmed, but on a different rationale. *People v. Wardlow*, 701 N.E.2d. 484 (Ill. 1998). It concluded that flight alone in a high-crime area was not sufficient to justify a stop and frisk under *Terry*, not only because of the ambiguous nature of flight but also because of an individual's right to freedom of movement and freedom of association. *Id.* at 486–487.

SUMMARY OF ARGUMENT

In *Terry v. Ohio*, the Court accepted the argument of our nation's police that under appropriate circumstances, stop and frisk practices were necessary to ferret out crime and could coexist with the Fourth Amendment. In doing so, however, the Court set a condition precedent: prior to any such encounter, the police must possess solid factual justification that the target of the stop and frisk likely is prepared to engage in criminal behavior. This condition was established to protect core Fourth Amendment interests and to prevent groundless harassment of citizens.

As the Illinois Supreme Court recognized, the question this case presents: whether the mere fact of flight from police — either alone or in conjunction with a high-crime setting — would be a close one as a matter of abstract Fourth Amendment principle. The rights of free association and freedom of movement protected by the First, Fourth, and Fourteenth Amendments should not be causally disregarded. But the Fourth Amendment question this case presents need not — and should not — be decided as an abstract matter. As documented herein, the incidence of police harassment, mistreatment, and even physical abuse of law-abiding minority citizens is sufficiently high that a desire to avoid police contact is no longer a reliable indicator that criminality is afoot. Nor should the fact that flight occurs in a "high-crime" area be used to change the equation: the documented problems of police abuse are most serious in precisely those areas where police are most quick to presume guilt, and the protections of the Fourth Amendment must not be allowed to mean one thing for the residents of our inner cities (those who are *most* vulnerable to unreasonable and dangerous police conduct) and another for those who live in our Nation's "low-crime" enclaves.

Why an inner-city resident flees at the sight of a police officer is at best ambiguous, and cannot by itself provide sufficient indicia

that the citizen is about to commit a crime. Many residents in such communities, and particularly minority members, have in the past been harassed by some law enforcement officers and continue to suffer from such abuse. They possess a legitimate and reasonable fear of such officials. Indeed, police harassment of law abiding minority citizens is an acute problem throughout this country.

Unlike prior cases that show police had a credible working hypothesis that it was likely the suspect was about to commit a crime, the only factor possessed by police here is Mr. Wardlow's flight after seeing Officer Nolan. This factor alone, and in conjunction with the fact that these events took place in an urban community with a high incidence of crime, fails to satisfies *Terry's* reasonable suspicion test. The judgment of the Illinois Supreme Court should be affirmed.

ARGUMENT

Without More, Flight From Police Fails To Establish Likelihood of Criminal Activity.

A. *The* Terry/Sibron *Compromise: Police May Utilize Stop & Frisk Tactics But Only When Circumstances Show Ample Factual Justification That Suggests Criminal Activity Is Afoot.*

This Court's decision in *Terry* was a milestone for both the Fourth Amendment and police-citizen relations. For the first time, the Court gave its blessing to police-initiated encounters in the absence of probable cause. The Court concluded that when an officer possesses objective factors that reasonably suggest a citizen might well be about to commit a crime, the Fourth Amendment allows the officer to stop that person briefly, and if circumstances reasonably suggest the suspect might be armed, to conduct a brief pat-down search for weapons. Such "legitimate and restrained conduct undertaken on the basis of ample factual

justification" is not "unreasonable" under the Fourth Amendment, the Court concluded; indeed it exemplifies effective policing. *Id.* at 15.

At the same time, the *Terry* Court fully acknowledged the weighty constitutional and community security costs that arise when stop and frisk practices are employed in the absence of such articulable, objective factors. The Fourth Amendment right to be free from unreasonable searches and seizures is an "inestimable right of personal security," *Id.* at 8-9, and a pat-down search of a citizen's body "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be taken lightly." *Id.* at 17. "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening and perhaps humiliating experience." *Id.* at 24-25.

The Court recognized as well the judiciary's important role in securing police compliance with its rule. Because illicit use of stop and frisk tactics can "only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities, . . . courts . . . retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it *must be condemned* by the Judiciary . . . ." *Id.* at 12, 15 (emphasis added).

In application, the Court has consistently approved encounters supported by credible indicia of likely criminal activity and rejected ones that lacked adequate factual support. The *Terry* Court found Officer McFadden's confrontation and search of Terry reasonable because it took place only after attentive study of what first appeared to be innocent behavior, but as time passed strongly suggested that Terry and others were preparing to commit

armed robbery. *Id.* at 27-30. Similarly in *United States v. Cortez*, 449 U.S. 411 (1980), the Court found reasonable a stop of a truck because border patrol officers had first carefully analyzed a number of factors that, collectively, firmly suggested the truck likely contained illegal aliens and their guide. 449 U.S. at 419–420.[2]

On the other hand, the Court has not hesitated to reject as constitutionally impermissible encounters that lack sufficient indicia of wrongdoing. In *Terry's* companion case, *Sibron v. New York*, 392 U.S. 40 (1968), an eight-hour surveillance yielded only that Sibron was cavorting with several known drug addicts; the officer's subsequent search based on this information was firmly rejected as unreasonable. In *Brown v. Texas*, 443 U.S. 47 (1979), the Court determined that a citizen's presence in a high-crime area and refusal to identify himself to police lacked adequate indicia of wrongdoing. 443 U.S. at 52. In *Reid v. Georgia*, 448 U.S. 438 (1980), the Court rejected Reid's traveling with another person but walking apart from him and occasionally looking back at his companion, as insufficient suggestion of drug trafficking. 448 U.S. at 441. Thus, unless the circumstances as a whole reasonably suggest criminal behavior is likely afoot, the Fourth Amendment

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[2] *See also Adams v. Williams*, 407 U.S. 413 (1975) (finding reasonable suspicion supported by the time of day, location of the suspect in a car by themselves and informant's tip that the suspect possessed narcotics and a weapon); *United States v. Sokolow*, 490 U.S. 1 (1989) (finding police officer had reasonable suspicion to stop suspect in the airport based on a combination of over five factors which suggested when taken together that the suspect was trafficking narcotics); *Alabama v. White*, 469 U.S. 325 (1990) (finding reasonable suspicion granted to stop an individual based on an anonymous telephone tip, and subsequent corroboration as a result of independent police work). *See also Michigan v. Chesternut*, 486 U.S. 567 (1988) *and California v. Hodari D.*, 499 U.S. 621 (1991) (suggesting that no *Terry* violation occurred where police seized fleeing youths after witnessing youths discard contraband).

protection against government intrusion requires police to refrain from stop and frisk activities.

B. *The Currently Troubled State of Police-Minority Community Relations Is Highly Relevant To Understanding Why Citizens Flee From Police.*

Illinois and its *amici* ask the Court to conclude that the mere fact of flight from police in a high-crime area is sufficiently suggestive of likely involvement in imminent criminal conduct under *Terry* to justify an otherwise unconstitutional seizure and search. Illinois argues that while some avoidance behavior, such as a citizen's avoiding eye contact with the police, is not necessarily suggestive of suspicious conduct, "running away from a clearly identifiable police officer constitutes an innately suspicious reaction to the presence of police." Illinois Br. at 9. The United States argues that while flight "*may* be undertaken for innocent reasons, it is not behavior in which innocent persons commonly engage -- and it is far more likely to signal a consciousness of wrongdoing and a fear of apprehension." United States Br. at 6 (emphasis in original). Several state Attorneys General assert more boldly that when citizens face unwanted police attention, the innocent walk way, but the guilty flee. Ohio *et. al.* Br. at 5 ("A potential suspect with a guilty conscience may or may not know the police have independent information tying her to particular crimes; but when the officer shows up, the citizen does not want to stay and find out -- she runs. On the other hand, the citizen without the guilty conscience may desire to avoid interacting with police, so she declines to listen to, or to answer, police questions and walks on . . . ."). The Criminal Justice Legal Foundation (herein CJLF) asserts that a per se rule is appropriate because "flight supports reasonable suspicion because of the close relationship between flight from authority and a guilty mind." CJLF Br. at 3.

As we show below, these views ask too much. There is good reason why the majority of courts that have considered the issue have rejected this position.[3] Simply put, the circumstances under which a citizen will run from the police are too numerous, and too often based in innocence, to justify a per se rule.[4] At most, it can be but one factor among many warranting consideration. Moreover, while Illinois and its *amici* profess to accept the *Terry* principle that reviewing courts must examine the totality of the circumstances before adjudging an encounter reasonable as a constitutional matter, *see, e.g., Cortez*, 449 U.S. at 418, none discuss or consider a factor that has enormous relevance to understanding why inner-city African-American residents would flee from police. That circumstance is fear, the sincere and understandable response that many inner-city minority residents — the law-abiding no less than the criminal — to potential encounters of any type with police.[5]

C. *Overwhelming Evidence Shows That Minority Citizens Fear Law Enforcement Officers Because of Systemic Harassment and Abuse.*

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[3] *See, e.g., Nebraska v. Hicks*, 488 N.W.2d. 359, 362 (Neb. 1992) (collecting cases); *People v. Shabaz*, 378 N.W.2d. 451 (Mich. 1985); *People v. Aldridge*, 674 P.2d. 240 (Cal. 1984).

[4] *See, e.g., Hicks*, 488 N.W.2d. at 363 ("fear or dislike of authority, distaste for police officers based upon past experience, exaggerated fears of police brutality or harassment and fear of unjust arrest are all legitimate motivations for avoiding the police."); *State v. Arrington*, 582 N.E.2d. 649, 658 (Ohio Ct. App. 1990) ("it is not unreasonable for a young, black male living in a neighborhood with drug sales and liable to be stopped to run when approached by a police car...").

[5] The CJLF notes the relevance of this factor, but inexplicably limits it to "recent immigrants from police states." CJLF Br. at 25. The Americans for Effective Law Enforcement, Inc., *et. al.* brief raises generally the subject of policing minority communities, but does not discuss this issue.

There is no question the *Terry* Court was correct in recognizing the subversive effect upon both Fourth Amendment values and constructive law enforcement-community relations that result when police accost citizens in the absence of reasonable suspicion of criminal activity. Yet in many minority communities in contemporary America, youth and adults are to a staggering degree subjected to stops, frisk, beatings, and in some instances, to lethal injuries, in the absence of any wrongdoing on their part. These tragic patterns of pervasive police misconduct have many harmful consequences, not the least of which is that many minority citizens — and especially young men in inner cities — no longer perceive an approaching police officer as a benign force. To the contrary, bitter experience teaches — and empirical research confirms — that officers often initiate such encounters in bad faith, with little regard to these citizens' basic human dignity, let alone their constitutional rights.

Police experts understand the effects of unrestrained police stop and frisk activity upon a subject community. The "real problem with *Terry* is that police stop and frisk when it isn't as justified as it was in *Terry*."[6] A highly decorated-former officer believes unauthorized stops poison police-citizen relations because "a *Terry* stop says terrible things about its subject; it is the officer's way of telling a person you look wrong and I am going to check out my feelings about you even if it embarrasses you."[7] Thus:

> [a] citizen's good or poor opinion may largely be formed by the impression the citizen has of those fleeting contacts

[6] Jerome Skolnick, *Terry and Community Policing*, 72 ST. JOHN'S L. REV. 1265, 1267 (1998).

[7] James J. Fyfe, *Terry: A[n Ex-]Cop's View*, 72 ST JOHN'S L REV. 1231, 1243 (1998).

> with . . . [police]. No other state officials have the discretionary power, sometimes exercised within seconds, to consider and apply the law to a citizen, to restrain a citizen's liberty by temporary detention, to invade a citizen's privacy by search or even to injure or kill a citizen in self-defense or in protection of others.[8]

Yet despite the Court's and law enforcement's understanding of the corrosive harm that results from illicit and unwanted police-initiated encounters with citizens, the widespread practice by beat officers in many urban and minority communities is to defy rather than to comply with *Terry*'s admonitions. James Baldwin's haunting declaration from three decades ago — "from the most circumspect church member to the most shiftless adolescent, who does not have a long tale to tell of police incompetence, injustice, or brutality?"[9] — sadly is as apt today as when it was first written. This view is shared not only by police critics but also by some of the most respected voices in law enforcement.

Charles H. Ramsey, Chief of Police in Washington, D.C., noted earlier this year that "despite tremendous gains throughout this century in civil rights, voting rights, fair employment and housing, sizeable percentages of Americans today, especially Americans of color, still view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day to day application."[10] One major reason for these views is stop and

[8] JOHN J. FARMER, NEW JERSEY STATE ATTORNEY GENERAL, FINAL REPORT OF THE STATE POLICE REVIEW TEAM 2–3 (JULY 2, 1999).

[9] JAMES BALDWIN, *Fifth Avenue Uptown in* NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON 62 (1961).

[10] PETER VENIERO, NEW JERSEY STATE ATTORNEY GENERAL, INTERIM REPORT ON STATE POLICE PRACTICE AND ALLEGATIONS OF RACIAL PROFILING, April 20, 1999 at 46 (quoting from "Overcoming Fear, Building Partnerships: Towards a New Paradigm in Police Community Race Relations" a presentation by Charles H. Ramsey given at the

frisk. "Field interrogations that are excessive, that are discourteous, and that push people around, generate friction."[11] George Kelling, a Rutgers University criminal justice professor and well known proponent of the "broken windows" theory of crime control, agrees that stop and frisk practices possess "tremendous potential for abuse," and he is deeply critical of police departments which "indiscriminately stop and frisk people."[12] Former Officer Fyfe observes that in his experience, too many officers today are "just making guesses and quite often they are wrong."[13]

One likely explanation for this state of affairs is that a significant minority of line officers believe that no countervailing consideration — be it the respect for personal security embodied in the Fourth Amendment or the equal treatment mandate of the Fourteenth — should constrain the work of ferreting out crime. A Baltimore police officer and president of the Baltimore Fraternal Order of Police openly remarked recently, "of course we do racial profiling at the train station. If 20 people get off a train and 19 are white guys in suits and one is a black female, guess who gets followed? If racial profiling is intuition and experience, I guess we all racial-profile."[14] Another experienced officer in Southern California recently confided "racial profiling is a tool we use, and don't let anyone say otherwise. . . . Like up in the valley, . . . I

Attorney General's Law Enforcement Summit, in East Rutherford, N.J. on December 11, 1998.)

[11] Skolnick, *supra* note 6 at 1267.

[12] Larry Reibstein, *NYPD Black and Blue*, NEWSWEEK, June 2, 1997 at 65.

[13] *Id.* at 66.

[14] Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAGAZINE, June 20, 1999 at 51.

know who all the crack sellers were -- they look like Hispanics who should be cutting your lawn."[15]

Minority police officers who have found the courage to speak on the record complain that in many departments, a number of fellow officers routinely harass minority citizens. Gene Jones, a black police officer in Philadelphia and a staff sergeant in the New Jersey National Guard told of the lengths that he goes to in order to avoid traveling on the New Jersey Turnpike so he will not be stopped by state patrol officers; "Yeah, I go to Jersey for Guard weekend, I take the back roads. I won't get on the turnpike. I won't mess with those troopers."[16] Several minority New Jersey State Police officers recently filed suit against that agency, confirming the prevalence of racial prejudice in its operations.[17] In another instance, a black Philadelphia police officer related that he was pulled over in a predominantly white suburb, purportedly because his inspection sticker was placed "abnormally high" on his windshield.[18]

Because these aggressive tactics flout the very law the officers are duty-bound to enforce, police departments throughout the country are seeing increased numbers of complaints of arbitrary and unfair street stops, as well as for use of excessive force,[19] and brutality.[20] Such large numbers of complaints from

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[15] *Id.* at 57.

[16] *Id.* at 60.

[17] *Minority Troopers Describe A Culture of Discrimination*, N.Y. TIMES, July 8, 1999 at B2.

[18] Goldberg, *supra* note 14 at 60.

[19] In New York, complaints of excessive force have increased 41% since the police department instituted a zero-tolerance policy. Of those complaints, 75% were filed by African-American and Latino citizens. *See* Bruce Shapiro, *When Justice Kills*, THE NATION, June 9, 1997 at 21.

minority community citizens have prompted the NAACP to announce that ending racial profiling is a top organizational priority.[21] National and local civil rights commissions are increasingly called to investigate harassing police practices.[22] In Omaha, Nebraska, the Human Relations Board recently found that there was little trust between Omaha police and African-American citizens, and that many people of color felt mistreated or harassed by the police because of their race.[23] A task force in Montgomery County, Maryland held similar hearings at which numerous witnesses recounted having been stopped because they were in predominantly white neighborhoods.[24] In Worcester, Massachusetts, the local civil rights commission held a series of hearings at which troubling and substantial allegations of racial profiling and excessive force were aired.[25] In Denver, the local newspaper listed a string of clear abuses of authority all arising in

[20] The Christopher Commission found numerous police radio messages in Los Angeles which celebrate the use of unnecessary force against citizens: "make sure you burn him if he's on felony probation - by the way does he need any breaking?," and "Did U arrest the 85 year old lady of [sic] just beat her up[?]" with the response of "We just slapped her around a bit. . . she/s getting m/t [medical treatment] now." UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION 25 (May 1999).

[21] Paul Zielbauer, *Racial Profiling Tops NAACP Agenda*, N.Y.TIMES, July 11, 1999 at 23.

[22] John J. Monahan, *Hearings on Alleged Police Abuse Set*, TELEGRAM & GAZETTE, September 5, 1999 at A3.

[23] Jean Jacovy, *Chief's Move Next on Minorities Board Recommendations*, OMAHA WORLD HERALD, September 1, 1998, at 9.

[24] Katherine Shaver, *Panel Releases Report on Montgomery Police*, WASHINGTON POST, August 26, 1998, at B05. The task force also heard testimony from a parent who reported that his "teenage son had been followed repeatedly by a police officer who had threatened to kill him if he did not leave the area." *Id.*

[25] Monahan, *supra* note 22 at A3.

a single year: "a patrolman is captured on videotape aiming his gun at a woman in a holding cell; an officer kicks a suspected cop killer as a TV photographer tapes him; a seven year veteran of the police force is arrested for allegedly ramming a man with his police cruiser, then breaking his jaw with three kicks to the face."[26] In New York City, the United States Civil Rights Commission recently held hearings on the stop and frisk practice of the NYPD's Street Crimes Unit.[27]

Emerging data reveals that minority citizens are increasingly unhappy with these aggressive police practices, and that they often are the targets of distasteful encounters that rarely lead to arrest. In May of 1999, the Department of Justice released a twelve-city survey on community perceptions of law enforcement. The survey found that African-American residents were twice as likely to be dissatisfied with police practices than were white residents in the same community.[28] These data nearly mirror findings of 30 years ago.[29] A study by the Joint Center for Political and Economic Studies in April 1996 found that 43% of African Americans consider "police brutality and harassment of African-Americans a

[26] Patricia Callahan and Jeffrey A. Roberts, *63% of Police Disciplined One in Four Commit Most Violations*, DENVER POST, April 27, 1997, at A01.

[27] Kevin Flynn, *Two Polar Views of Race at U.S. Hearing*, N.Y. TIMES, May 27, 1999 § B at 5.

[28] STEVEN K. SMITH ET AL., CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, (Department of Justice, NCJ 173940, May 1998).

[29] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 146 (1967) (finding African-American citizens "significantly more negative in evaluating police effectiveness in law enforcement").

serious problem" in their own community.[30] In fact a survey of polls conducted across the nation and reported in the National Institute of Justice's Journal suggests that "many black Americans are disaffected and suspicious. They are not confident that the police will be fair. They are not confident that the police will be professional. They are not confident that the police will 'protect and serve.'"[31]

Available data on stop and frisk practices show these misgivings to be well-founded. The data show that a large number of citizens who are stopped and often frisked — disproportionately members of racial and ethnic minority groups — were engaged in no criminal conduct. Over a two-year period starting in 1997, the New York City Police Department Street Crimes Unit stopped and frisked 45,000 citizens focusing on "high crime areas."[32] Only twenty percent of the individuals stopped were arrested. The other 35,500 citizens who lived, worked and traveled in these neighborhoods were subjected to the "annoying, frightening and perhaps humiliating experience," *Terry*, 392 U.S. at 25, of police detainment despite being innocent of any of the wrongdoing of which they were "suspected." A New York newspaper survey found that 81 out of 100 randomly questioned young black and Hispanic men living in New York City had been stopped and frisked by the police at least once.[33] The survey reported that none of the 81 stops resulted in arrests. In Pittsburgh, young black males were stopped an average of 3.47 times during a

[30] Jean Johnson, *Americans' Views on Crime and Law Enforcement: Survey Findings*, NATIONAL INSTITUTE OF JUSTICE JOURNAL (September 1997).

[31] *Id.*

[32] Holman W. Jenkins Jr., *What Happened When N.Y. Got Business Like About Crime*, WALL STREET JOURNAL, April 28, 1999.

[33] Leslie Casimir, *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS, March 26, 1999.

five year period compared to white residents who were stopped an average of 1.53 times during the same period.[34] In St. Petersburg, Florida, a study of police field interrogation reports found that police conducted street stops of more than 9,000 people over a period of twenty months, with African-American residents being stopped entirely out of proportion to their share of the City's population. A review of the reasons listed by police officers to justify the stops included standing by a pay phone, standing outside a house smoking a cigarette, and riding a bicycle the wrong way down a one-way street.[35]

A 1991 report on the Boston Police Department conducted by the Massachusetts Attorney General concluded that police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals.[36] The report went on to note that:

> the most disturbing evidence was that the *scope* [emphasis in original] of a number of *Terry* searches went far beyond anything authorized by that case and indeed, beyond anything that we believe would be acceptable under the federal and state constitutions even where probable cause existed to conduct a full search incident to an arrest. Forcing young men to lower their trousers or otherwise searching inside their underwear, on public streets or in public hallways, is so

[34] Ann Belser, *Suspect Black Men Are Subject to Closer Scrutiny from Patrolling Police and the Result is More Often Fear, Antagonism Between Them*, PITTSBURGH POST GAZETTE, May 5, 1996 at A15.

[35] Tim Roche and Constance Humburg, *Stops Far Too Routine For Many Blacks*, ST. PETERSBURG TIMES, October 3, 1997 at A1.

[36] JAMES M. SHANNON, ATTORNEY GENERAL, REPORT OF THE ATTORNEY GENERAL'S CIVIL RIGHTS DIVISION ON BOSTON POLICE DEPARTMENT PRACTICES 60 (December 18, 1990).

demeaning and invasive of fundamental precepts of privacy that it can only be condemned in the strongest terms.[37]

This report also documented numerous incidents of police brutality that occurred during street stops. One sixteen year-old African-American male reported being stopped, strip-searched approximately seven times, and forced to lie face down on the ground. The youth's account, credited by investigators, reported that "the officers often emerged from the cruisers with guns drawn, put the guns right to his face, and said that if he moved, they would shoot him or 'blow [his] flattop off.'"[38] A seventeen year old black male reported credibly that in 1990 while standing on a corner, two police officers said "you fucking niggers, get [out]. We don't want you hanging on the street anymore."[39] The police officer, after asking the youth what was in his mouth, hit him and threw him to the ground and then proceeded to conduct a strip search. Neither youth was arrested, let alone charged with any crime.

The Massachusetts Report concluded in no uncertain terms that "the communities hardest hit by crime must not be forced to accept the harassment of their young people as the price for aggressive law enforcement. . . . It is hardly an object lesson in respect for the law and for the police to be searched for no other reason than that you are young, black and wearing a baseball cap."[40]

In Philadelphia, when race was recorded on the police department field reports, the overwhelming majority (80.2%) of stops were of African Americans even though the districts in

[37] *Id.* at 61.

[38] *Id.* at 39.

[39] *Id.* at 44.

[40] *Id.* at 67.

question were racially integrated.[41] A review of these reports for three districts over a week revealed that the police recorded no explanation in over half of the stops.[42] None of these stops resulted in an arrest. Moreover, a number of field reports listed "stopped for investigation" as the primary reason for making the stop. Other justifications recorded by police officers included hanging out on a corner, being homeless, and observing a female in a known prostitution area.[43] In addition to the fact that these stops were based on wholly innocent activities insufficient to constitute reasonable suspicion, nearly twice as many minorities were subject to stops and frisks as compared to white residents.[44]

Recent studies also show that more often than not, minority citizens are subject to harsher treatment than whites during these encounters. The Christopher Commission's examination of police practices in Los Angeles in the wake of the first Rodney King verdict documented how minority residents were more likely to be subjected to excessive force, longer detentions not resulting in a charge, and to invasive and humiliating police tactics.[45]

[41] Plaintiffs' Fourth Monitoring Report, *Pedestrian and Car Stop Audit* at 16, NAACP, Philadelphia Branch and Police Barrio Relations Project v. City of Philadelphia, No. 96-CV-6045 (E. D. Pa. 1998).

[42] Sixty-two percent of the time the police did not record an explanation for the stop. *See id.* at 26–27.

[43] *Id.* at 12–13.

[44] *Id.* at 13.

[45] The prone-out position is a "police control tactic that requires the suspect first to kneel, and then lie flat on his stomach, with his arms spread out from his sides or his hands behind his back. The Commission received numerous accounts of incidents involving African-American and Latino males stopped for traffic infractions, who were "proned-out under circumstances that did not present any risk of harm to the officers and that did not involve a felony warrant." UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 20 at 27 n.119.

The Commission further determined that when the Los Angeles Police Department adopted a policing model emphasizing aggressive street patrol, one result was the alienation of the majority of law abiding citizens. The report concluded that these citizens "viewed the police department with mistrust, since they were perceived by the police as potential criminals."[46] In that same report, a survey of 900 police officers in LAPD found that one quarter of the respondents felt that "racial bias (prejudice) on the part of the officers towards minority citizens currently exists and contributes to a negative interaction between police and community."[47]

Increasingly, even citizens who were initially supportive of aggressive stop and frisk efforts in their neighborhoods are expressing second thoughts. As one Upper Manhattan resident recently explained, "in the beginning we all wanted the police to bomb the crack houses. But now it's backfiring at the cost of the community. I think the cops have been given free rein to intimidate people at large."[48]

Others — predominantly African-American and Latino parents — have felt sufficiently fearful of the dangers of contact with the police that they have enrolled themselves and their children in seminars that teach how to decrease the likelihood of harm when encountering the police.[49] Moreover, the Allstate Insurance Company has become so concerned with the state of police relations with youth that it recently undertook to finance a

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[46] *Id.* at 29.

[47] *Id.* at 56.

[48] DAVID COLE, NO EQUAL JUSTICE 46 (1999).

[49] *ABC World News Tonight with Peter Jennings: Lessons for Kids on Handling Police* (ABC television broadcast, March 19, 1999).

joint project with the NAACP to distribute pamphlets to youngsters on how to act when confronted by a police officer. The pamphlets, entitled "The Law and You," instruct teenagers to "avoid any action or language that might trigger a more volatile situation, possibly endangering your life or personal well-being."[50]

This glimpse of the present status of police-community relations in many areas of the country is sadly similar to the one the *Terry/Sibron* Court confronted and acknowledged three decades ago.[51] As it informed the Court's holding then that stop and frisk tactics be employed only on the basis of ample factual justification, the stubborn presence of these very same conditions today require the Court to consider, as a circumstance of this case, the fear that minority citizens in inner cities reasonably hold when they see officers of the law.

D. *Consideration of All the Relevant Facts Requires A Conclusion That Wardlow's Flight Is Not Sufficiently Suggestive of Likely Imminent Criminal Conduct to Justify a* Terry *Seizure.*

This case contrasts with those in which the Court has been willing to uphold seizures and frisks in the absence of probable cause, and resembles far more closely the ones in which the Court has found the factual showing inadequate. Unlike the careful and deliberate police work described in *Terry* and *Cortez*, Officer

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[50] *The Law and You: Guidelines for Interacting With Law Enforcement Officials* (produced in partnership by the NAACP, National Organization of Black Law Enforcement Executives and Allstate Insurance Company).

[51] *See Terry*, 392 U.S. 1, 14–15 & n.11 (affirming the necessity of the courts "to guard against police conduct which is overbearing or harassing, or which trenches upon the personal security without the objective evidentiary justification which the Constitution requires" and the fact that stop and frisk can "be a severely exacerbating factor in police community tensions").

Nolan's decision to seize and frisk Wardlow was made nearly instantly, upon Wardlow's flight, and without the development of any other fact that might have confirmed the hunch that Wardlow was about to commit a crime. Indeed, prior to seeing Wardlow, Nolan had no information of any reported crime in the area, nor was there any suggestion that Wardlow might be involved in any criminal activity. In appearance, Wardlow was violating no law. He was merely standing on the sidewalk, and like many urban residents, was carrying a bag. And even after he began to run, he broke no law, nor gave Nolan any further articulable reason to believe he was committing, or about to commit a crime, or was armed. At the moment that Nolan seized control of Wardlow and commenced to pat him down, Nolan possessed no additional information that suggested that Wardlow was violating any law. This case is much more like *Brown v. Texas* in that in both, the police acted quickly on hunches and failed to develop sufficient evidence that criminal conduct was afoot prior to the stop.

CONCLUSION

The issue that divides us from Illinois is not whether flight can be considered as a *Terry* factor, but whether flight alone satisfies *Terry's* "ample factual justification" requirement. Given the state of police-community relations, flight from police neither reliably nor sufficiently suggests that criminal activity is afoot. Because Illinois and its *amici* have failed to show otherwise, the Court should affirm the judgement of the Illinois Supreme Court.

Dated: August 9, 1999

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IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF ILLINOIS,
Petitioner,

v.

WILLIAM A/K/A SAM WARDLOW,
Respondent.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

I. Whether the sudden and unprovoked flight from a clearly identifiable police officer, who is patrolling a high crime area, is sufficiently suspicious to justify a temporary investigatory stop pursuant to *Terry v. Ohio*.

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, __ U.S. __, 119 S.Ct. 1297 (1999) and *Slack v. McDaniel*, __ U.S. __, 119 S.Ct. 1025 *(cert. granted)*, Sup.Ct. No. 98-6322 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

[1] *Amicus curiae* The Rutherford Institute files this brief with the consent of counsel for both parties. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

The Supreme Court has directly held that a police pursuit of a subject, in and of itself, does not constitute a "seizure" of that subject, regardless of whether reasonable suspicion to stop or probable cause to arrest exists. *California v. Hodari*, 499 U.S. 621 (1991); *Brower v. Inyo County*, 489 U.S. 593 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1998). *California v. Hodari* held, on facts substantially similar to those in the case now before the Court, that a subject who fled from approaching officers in a high-crime area was not "seized" in the course of the chase or when confronted by an officer at the end of it, but only upon being tackled by the officer. 499 U.S. at 626 ("assuming [the officer's] pursuit ... constituted a 'show of force' enjoining [the defendant] to halt, since [defendant] did not comply with that injunction he was not seized until he was tackled"). Consequently, no reasonable suspicion of the subject was required to justify the admission into evidence of a rock of cocaine the subject dropped when confronted. 499 U.S. at 629. In the present case, therefore, the Court's prior rulings suggest that the officers' pursuit of Respondent did not, and could not, produce a "seizure" of Respondent until he was "cornered," "stopped" and subjected to "a protective pat-down search" for weapons. *Illinois v. Wardlow*, 183 Ill.2d 306, 308, 701 N.E.2d 484, 485, *cert. granted*, 119 S.Ct. 1573 (1998).

The Court now considers the question it left open in *California v. Hodari* and *Michigan v. Chesternut*: "whether the act of fleeing, by itself, [is] sufficient to constitute reasonable suspicion justifying [a] seizure." *Chesternut*, 486 U.S. at 572.[2]

[2] *See also Hodari*, 499 U.S. at 623:

> That is would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident .... We do not decide that point

The Court's *amicus* submits that in view of the Court's *dictum* in *Chesternut* and *Hodari* questioning the propriety of an "investigatory pursuit," and the inevitable use of such a tool to harass and intimidate the populace in "high-crime areas," police authorities should not enjoy *carte blanche* under the Fourth Amendment to initiate dangerous foot or vehicle chases simply on the basis of flight. Such a rule would be tantamount to announcing "open season" on individuals who are deemed suspicious and who exercise "at top speed" their constitutional right to refuse to converse with the officers. *Ilinois v. Wardlow*, 183 Ill.2d 306, 701 N.E.2d 484 (1998), *cert. granted*, 119 S.Ct. 1573 (1998), quoting *People v. Shabaz*, 424 Mich. 42, 63, 378 N.W.2d 451, 460 (1985). The touchstone of *Terry* stop jurisprudence has always been the reasonableness of the stop in relation to the totality of the circumstances and the means employed. The Rutherford Institute submits that Illinois' proffered standard is fundamentally unreasonable in both means and ends and thus contravenes the protections of the Fourth Amendment.

III. ARGUMENT

A. THE STATE OF ILLINOIS SEEKS AN UNREASONABLE AND ABUSIVE EXPANSION OF THE RATIONALE FOR PERMITTING BRIEF INVESTIGATORY STOPS ENUNCIATED IN *TERRY V. OHIO* AND SUBSEQUENT CASES.

Terry v. Ohio, 392 U.S. 1 (1968), reviewed an officer's decision to conduct a "pat-down" search for weapons after

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here, but rely entirely upon the State's concession [that the officer lacked reasonable suspicion to stop the defendant].

observing the subjects engaged in behavior consistent with "casing" a store for a burglary. 392 U.S. at 10-11. The opinion of the Court was carefully and explicitly limited in rationale to a concern entirely apart from the governmental interest in investigating crime: the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." 392 U.S. at 23. The Court cautioned:

> [S]uch a search ... is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

392 U.S. at 29.[3]

Nonetheless, commencing almost immediately after the Court's companion decisions in *Terry v. Ohio* and *Sibron v. New York*, 392 U.S. 40 (1968), the carefully crafted exception to the probable cause requirement enunciated in those cases has been progressively expanded until, as one former Justice warned, the *Terry* exception threatens to "swallow the general rule that Fourth Amendment seizures [and searches] are

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[3] For this reason, the Court reversed the conviction of the defendant in the companion case to *Terry*, *Sibron v. New York*, 392 U.S. 40 (1968), on the grounds that a frisk motivated only by a search for narcotics "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man." *Id.* at 65.

reasonable only if based on probable cause." *Florida v. Royer*, 460 U.S. 491, 509 (1983) (Brennan, J., concurring) (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)). The expansion began with *Adams v. Williams*, 407 U.S. 143 (1972), which extended the police safety rationale of *Terry* to permit pat-down searches based on reasonable suspicion of possessory offenses over the vigorous dissents of three of the Justices, one of whom warned that the decision "expand[ed] the concept of warrantless searches far beyond anything heretofore recognized as legitimate." 407 U.S. at 154-55. It continued with an extension of *Terry* stop authority to conduct vehicle searches for illegal immigrants, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), then to permit searches based upon reasonable suspicion of past criminal activity alone. *United States v. Hensley*, 469 U.S. 221 (1985).

The Petitioner now seeks to further expand the use of investigatory stops to permit arbitrary and indiscriminate run-downs of subjects who elect to depart from the scene of a police investigation, absent any articulable suspicions relating to particular criminal conduct in which the fleeing subject may have been engaged, and apart from any concern that he may be armed and dangerous to the police or the public. For the reasons set forth below, the Court's *amicus* believes such a further expansion would be patently unreasonable and indefensible.

B. AN EXTENDED PURSUIT OF A FLEEING SUBJECT DESPITE HIS OBVIOUS DESIRE TO EXERCISE HIS RIGHT TO AVOID POLICE IS A "SEIZURE," UNDER THE FOURTH AMENDMENT, AND THE RULE OF *CALIFORNIA V. HODARI* SHOULD BE REVISITED IN THESE CIRCUMSTANCES.

A person is seized when the officer, by means of physical force or show of authority, has restrained his freedom of movement. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *Terry*, 392 U.S. at 19, n.16. A person who has elected to remove himself from the presence of officers, then finds that the officers are running at him in a threatening fashion and shouting, perhaps with other shows of authority such as cruiser vehicles following, police dogs barking or guns drawn, cannot possibly conceive that he is any longer "free to disregard the questions and walk away." *Mendenhall*, 446 U.S. at 554. He fully comprehends that his subjection to interrogation will be forcibly compelled. To hold otherwise is to redefine "free to leave," *Mendenhall, supra,* to mean "physically able to get away" rather than "authorized to leave."

When a subject exercises his right not to cooperate and walks or runs away, the State is obligated to justify the additional steps taken to chase down and subdue the subject. "[I]f the person refuses to answer and the police take additional steps ... to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S 210, 217 (1984).

This Court has condemned the use of force to subdue a suspect unless the suspect is armed and considered dangerous. *Tennessee v. Garner*, 471 U.S. 1 (1985); *cf. Brower v. Inyo County*, 489 U.S. 593. Such a violent subduction is a "seizure" under the Fourth Amendment. 471 U.S. at 7. The Court's majority in *California v. Hodari* appeared to hold that the pursuit of a subject did not constitute a "seizure," but that the tackling of the subject did; and that in fact, the subduction constituted not just an investigatory *Terry* stop, but an actual common law arrest. 499 U.S. at 630 (Opinion of Stevens, J.,

dissenting). This was doubtless due to the Court's perception that the violent run-down of a subject far exceeds the reasonable authority possessed by an officer to conduct a brief, investigatory pat-down of a subject before questioning him. A conclusion that the chase does not raise Fourth Amendment implications, but the physical trapping or subduction of the subject does, would place no reasonable parameters on police means to investigate crime. This result would be directly contrary to the rationale of *Terry* and its progeny, since it would allow completely unaccountable police pursuits of subjects on the sole basis that they have fled in the hope that they will be "flushed out" and discard contraband. Like the sophistry condemned in *Johnson v. United States*, 33 U.S. 10, 16-17 (1948), the State of Illinois seeks to justify the pursuit on the basis of the seizure, and the seizure on the basis of the pursuit.

According to *Hodari,* tackling a subject constitutes a "seizure" akin to an arrest, which requires the existence of probable cause. No probable cause to arrest Respondent has been urged in this case. Illinois' view would sanction pursuit of a citizen by officers who lack legal authority to catch him, in the hope that the subject will panic and discard contraband. This is the very essence of police harassment, the illegal threat to use unauthorized force in order to uncover evidence. The citizen who is exercising his constitutional right to avoid police "at top speed," *Wardlow, supra*, because of a known history of police excesses in his neighborhood will find no solace in the knowledge that their right to chase him down until exhaustion is a weapon proven effective in keeping his streets safe. Nor would this rule result in more actual arrests, since the word would quickly spread on the street that drug dealers will enjoy constitutional protection only if they keep their contraband on their persons and refrain from discarding it. Illinois' rule would

result only in drug dealers who are more physically fit, not a safer populace.

Furthermore, such a "wild west" approach to law enforcement would only serve to exacerbate tensions between law enforcement personnel and citizens. *Amicus* urges the members of the Court to bear in mind the invasive and humiliating nature of a "stop and frisk" search. The *Terry* Court restricted the use of the procedure in light of this understanding:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17. The Court went on to measure the nature and quality of the intrusion against police interest in imposing it, noting, "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25.

It is certainly true that "the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry*, 392 U.S. at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). On the other hand, "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter

invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 14. Such is the case where police conduct pursuits of subjects based only on flight in the hopes of "flushing out" contraband. In such a regime, police harassment would take the place of proper investigation as the principle means of crime control. The dangers of such a regime are obvious:

> The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court .... There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).[4]

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[4] One example of such a case is *Brown v. Texas* 443 U.S. 47 (1979) in which the defendant was observed in a high-crime area, stopped and patted down absent reasonable suspicion that he was armed or engaged in criminal activity. 443 U.S. 47. Ordinarily, the individual would have gone on his way, intimidated and humiliated but unable to obtain redress because the actions of the officer were not susceptible to proof that they were "shocking to the conscience" as amounting to a "deliberate indifference to" or "reckless disregard for" the subject's personal liberty. *Sacramento v. Lewis*, 523 U.S. 833 (1998). It was only because he was arrested and charged for refusing to provide his name that his case came to light, a practice the Court held violative of his right to decline to cooperate. 443 U.S. at 53.

The social costs of such a regime are substantial. The *Terry* Court recognized these costs, and cautioned:

> Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.

392 U.S. at 14-15. Recent research indicates that the "wholesale harassment" by police of minority groups has intensified in recent years. *See generally* David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (New Press, 1999) (noting that a recent poll found that nearly 90 percent of African-Americans in New York thought the police force often engaged in brutality against minorities and two-thirds said such brutality was widespread).

Terry cited The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183, 184 (1967), which found, *inter alia*, that "the friction caused by 'misuse of field interrogations' increases 'as more police departments adopt "aggressive patrol" in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.'" 392 U.S. at 14; n.11. A similar report a year later, the Kerner Commission Report, discussed the practices that contributed to the urban riots of that period, some of which have been or are now before the Court:

> In nearly every city surveyed, the Commission heard complaints of dispersal of social street gatherings and the stopping of Negroes on foot or in cars without objective basis .... One such practice involves a roving task force which moves into high-crime districts without prior notice and conducts intensive, often indiscriminate, street stops and searches.

Report of the National Advisory Comm. on Civil Disorders 157 (1968). The "dispersal of social street gatherings" is the practice the Court is currently reviewing in *Chicago v. Morales*, 177 Ill.2d 440, 687 N.E.2d 53 (1997), 118 S.Ct. 1510 (*cert. granted*); the "stopping of Negroes on foot or in cars without objective basis" was condemned as violative of the Fourth Amendment in *United States v. Brignoni-Ponce*, 422 U.S. 873; the practice of "roving task forces" conducting indiscriminate stops in high-crime areas is the factual context of the present case. *Amicus* contends that the Court should seek to harmonize its holding in the present case with its decision in *Chicago v. Morales* by finding that the police can neither force law-abiding citizens to move on or force them to stand still at the appearance of an officer. *Illinois v. Wardlow*, 183 Ill.2d at 313, 687 N.E.2d at 488.

C. PETITIONER'S SEIZURE OF RESPONDENT DID NOT CONSTITUTE A REASONABLE INVESTIGATIVE STOP.

1. Flight is not, standing alone, a fact sufficient to give rise to a reasonable suspicion that criminal activity is afoot or that the subject is armed and dangerous.

"[The] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21, n. 18. As the Court has noted, flight, standing alone, may well be reflective of innocence.[5] As such, it is indistinguishable from other neutral factors which have been held insufficient to justify an investigative stop. Such factors have included several presented in the instant case: presence in a high-crime area, *Brown v. Texas*, 443 U.S. 47, 52 (1979); association with notorious individuals, *Sibron v. New York*, 392 U.S. at 62 ("The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."); and race, *United States v. Brignoni-Ponce*, 422 U.S. 873 (practice of the Immigration and Naturalization Service of stopping vehicles away from the border on suspicion of carrying illegal immigrants based solely on the apparent Mexican ancestry of t' e occupants). When a factor such as flight is an activity which is itself constitutionally protected, It can provide no basis for a stop and search.

---

[5] *Amicus* suggests that Justice Scalia's hermeneutical digression in *California v. Hodari*, 499 U.S. at 624, n.1 (quoting Proverbs 28:1), was incomplete, and might well have included other proverbs that speak to this point: ""[W]hen the wicked rise to power, men go into hiding." Prov. 28:12; "A prudent man sees danger and takes refuge." Prov. 22:3. *See also Hodari*, 499 U.S. at 630, n.4 (Stevens, J., dissenting) ("We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority."); *Alberty v. United States*, 162 U.S. 499, 511 (1896) ("[I]t is a matter of common knowledge that men are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'").

2. Flight, with other facts before the court below, was not sufficient to give rise to a reasonable suspicion that the subject was engaging or preparing to engage in criminal activity or that he was armed and dangerous.

Flight may certainly be one factor in the consideration of reasonable suspicion to stop; indeed, it would severely handicap good police work to hold otherwise. "[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*." *Sibron v. New York*, 392 U.S. at 66-67; *see also United States v. Brignoni-Ponce*, 422 U.S. 873 (including among factors to be taken into account erratic driving or obvious attempts to evade officers). However, it is only "when coupled with *specific knowledge on the part of the officer relating the suspect to the evidence of crime*" that furtiveness and flight are proper factors to be considered. *Id.*

On the other hand, the Court has also held that authorities cannot lump together factors that, taken together, do not sufficiently restrict the inquiry. Diligence is necessary, the Court has warned, to ensure that the "very large category of presumably innocent" citizens who wish not to speak with police officers are not subject to "virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (a variety of circumstances which fell under the "drug courier profile" held insufficient to permit a stop because they encompassed a very large category of innocent travelers). Thus, in *Brown v. Texas*, the Court held that "looking suspicious" and being in an alley frequented by drug users were not sufficient factors to justify an investigative stop. 443 U.S. 47; *but cf. United States v. Sokolow*, 490 U.S. 1 (1989) (rule recognized, but factors held sufficient to justify stop).

Furthermore, other factors relating to the reasonable perception of the subject himself should also be considered in determining the existence of reasonable suspicion. Such factors include the incidence of police harassment or brutality in the neighborhood; the racial, ethnic, gender or other minority status of the subject, *United States v. Mendenhall*, 446 U.S. at 558 (it was "not irrelevant" to consider factors that the defendant was a black female who "may have felt unusually threatened by the [white male] officers") and the circumstances surrounding the appearance of the police on the scene, particularly the extent of the show of force, *e.g., Louisiana v. White*, 660 So.2d 515 (1995) (subjects fled when seven to eight officers converged on a vacant lot in an "organized routine patrol strike"), and whether the police are plainly identifiable as such. *Cf. Sibron v. New York*, 392 U.S. at 75 ("flight at the approach of a gun-carrying stranger ([the officer] was apparently not in uniform) is hardly indicative of *mens rea*.").

3. The means used to physically run down and seize the subject are not reasonably related to the end of questioning the subject.

The State of Illinois' actions also flout the central rule of *Terry* stop jurisprudence, that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *United States v. Brignoni-Ponce*, 422 U.S. 873; *United States v. Mendenhall*, 446 U.S. 554; *Florida v. Royer*, 460 U.S. at 500. "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." 392 U.S. at 28. The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive

means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. In reviewing police conduct in this area, the burden is upon the State to demonstrate the reasonableness of the scope and duration of the search in relation to its legitimate purpose. 460 U.S. at 500.

The Court determined in *Florida v. Royer* that an investigation that was permissible at its inception became an impermissible seizure by virtue of its extended duration and the coercive effect of taking the subject's airline tickets away, recovering his luggage and questioning him in a small, bare room. 460 U.S. at 502. An implication of the Court's opinion in is that the restriction on the defendant's ability to depart from the area within a reasonable period of time kept the search from being reasonably limited in scope to the purposes which justified it. Similarly, in *Dunaway v. New York*, an hour-long detention of the defendant was held to be "in important respects indistinguishable from a traditional arrest," since the defendant was never informed that he was 'free to go,' and would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. 442 U.S. at 212.

This view is consistent with general Fourth Amendment safeguards laid down by the Court in other contexts. Even a search incident to a lawful arrest must be limited in scope to that which is justified by the purposes served by that exception to the warrant requirement. *Florida v.Royer* , 460 U.S. at 498. Likewise, the "hot pursuit" exception to the warrant requirement permits the warrant requirement to be abandoned in the context of probable cause to arrest a fleeing suspect, but not reasonable suspicion to interrogate. *Johnson v. United States*, 333 U.S. 10 (1948). The chases under consideration in the instant case are much more characteristic of "hot pursuit,"

which may involve "an extended hue and cry 'in and about [the] public streets,'" than of an ordinary "stop and frisk." *United States v. Santana*, 427 U.S. 38, 43 (1976).

The Court's instruction in this area imposes a means-ends test for the reasonableness of an investigative tactic. The Court's *amicus* respectfully submits that the majority's perspective in *Sokolow* that "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques," 490 U.S. at 11, is not applicable in the context of a physically strenuous and risky pursuit like that in the instant case, where the police have ample opportunity to investigate criminal activity by other means, such as questioning those remaining at the location or neighbors living in the area.

Additionally, the practice of chasing subjects who may be armed down alleys on foot, or in police vehicles at high speed, actually increases the danger of injury or death to police officers and the public. This is contrary to the chief purported purpose of an investigatory stop and frisk. The counsel of Justice Harlan, concurring in *Terry*, is on point:

> Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.

392 U.S. at 32-33; *accord United States v. Mendenhall*, 446 U.S. at 553. Where an investigatory tactic poses a heightened danger to the police and the public, a concomitant heightened standard to justify the use of the tactic should also be imposed.

It is true that the "often competitive enterprise of ferreting out crime" requires that police have the authority to thoroughly investigate criminal activity and to disarm dangerous citizens. *Terry*, 392 U.S. at 12, quoting *Johnson v. United States*, 333 U.S. at 14. Nonetheless, it is equally true that the Supreme Court has "repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921). The "shotgun approach" to crime control displayed by the police in the instant case is markedly haphazard compared to the methodical, creative and deliberative police work that led to investigative stops that were upheld by the Court in other cases. *E.g., United States v. Cortez*, 449 U.S. 411 (1981); *Illinois v. Gates*, 462 U.S. 213 (1983). "A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of *legitimizing the conduct which produced the evidence*, while an application of the exclusionary rule withholds the constitutional imprimatur. *Terry*, 392 U.S. at 13 (emphasis supplied). Because they exceeded the bounds of what was reasonable and necessary to investigate illegality, the authorities in this case cannot be said to have exhibited the "restrained investigative conduct" the Court has sought to foster. *Terry*, 392 U.S. at 15. The decision of the Supreme Court of Illinois should consequently be affirmed.

IV. CONCLUSION

The Rutherford Institute respectfully suggests that the Court heed the words of Justice William O. Douglas, which are as true now as they were when written thirty years ago:

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.
>
> Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

Terry v. Ohio, 392 U.S. at 60-61 (Douglas, J., dissenting). The State of Illinois now beckons the Court to enter this "new regime" by sanctioning dangerous police chases of civilians based upon little or no reasonable suspicion of criminal conduct. The Court's *amicus* believes the Fourth Amendment does not countenance the police authorities of this nation making sport of its citizens. The Rutherford Institute respectfully submits that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM WARDLOW, aka SAM WARDLOW,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether a person's flight from four police cars carrying eight police officers caravanning through an undefined area is sufficient to justify an investigative stop pursuant to *Terry v. Ohio* when there is no objective evidence of criminal behavior.

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STATEMENT OF THE CASE

On September 10, 1995, a complaint was filed in the Circuit Court of Cook County charging Sam Wardlow ("Wardlow") with unlawful use of a weapon by a felon. App. 1. A finding of probable cause was made at the preliminary hearing on September 11, 1995, and Wardlow was charged by information with two counts of unlawful use of a weapon by a felon and two counts of unlawful use of a weapon. App. 1. Wardlow filed a Motion to Suppress Physical Evidence on October 11, 1995, which the court heard on October 25, 1995. App. 2.

At the suppression hearing, Officer Timothy Nolan testified that on Saturday, September 9, 1995, he was a uniformed Chicago police officer on duty assigned to the Special Operations Section in the 11th District. App. 4. He and his partner, Officer Harvey, were in the vicinity of 4035 West Van Buren. App. 7. In total, four police cars and eight Chicago police officers converged in that area at the same time; Officers Nolan and Harvey were in the last car. App. 8. Officer Nolan testified that he went to that area because "it's one of the areas in the 11th District that's high narcotics traffic." App. 8. He further testified that the purpose for having four cars converge on the same location was because "[n]ormally in these different areas there's an enormous amount of people, sometimes lookouts, customers." App. 8. Officer Nolan testified that when he first saw Wardlow, he was not violating any laws of the City of Chicago, the State of Illinois or the United States of America. App. 5. Rather, Wardlow looked in the police officers' direction and "began running," which Officer Nolan acknowledged was not against the law. Officer Nolan stated that as he drove southbound down

the street, he observed Wardlow running through the gangway. App. 5-6. Wardlow was cornered in the vicinity of 4036 West Congress. App. 9. Officer Nolan exited his vehicle and "placed a stop on [Wardlow]" but "did not announce his office or ask Wardlow any questions at that time." App. 6. Officer Nolan conducted a protective search for his own safety and squeezed a white opaque bag under Wardlow's arm, feeling a hard object that had a shape similar to a revolver or a gun. App. 6, 10. Officer Nolan then looked into the bag and found a .38 caliber handgun. App. 11. Officer Nolan placed Wardlow under arrest at 12:15 p.m.[1]

The trial judge reserved his ruling until December 6, 1995, at which time he denied the motion to suppress. App. 14. After a stipulated bench trial, the trial court found Wardlow guilty of unlawful use of a weapon by a felon and sentenced him to two years in the Illinois Department of Corrections. App. 16.

Wardlow appealed and on March 18, 1997, the Illinois Appellate Court unanimously reversed the lower court in *People of the State of Illinois v. Sam Wardlow*. App. 33. The Appellate Court held that the record was too vague to support the inference that Defendant was in a high crime area or that Defendant's flight was related to his expectation of the police focusing on him. App. 32. To assure that an individual's reasonable expectation of privacy was not subject to arbitrary invasions solely at the unfettered discretion of police officers, the

[1] Although the exact time of Wardlow's arrest is not contained within the record, it is stated in the police report and mentioned in both the Illinois Appellate and Supreme Court opinions. App. 17, 29.

Appellate Court stated that a high crime area should be a sufficiently localized and identifiable area. App. 33.

The State appealed the decision to the Illinois Supreme Court, which unanimously affirmed the judgment of the Illinois Appellate Court on September 24, 1998. App. 27. The Illinois Supreme Court reiterated that in order to protect the individual's right to personal security, free from arbitrary interference by "the law officers," such limited and investigatory stops are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person has committed, or is about to commit, a crime. App. 18-19.

The State of Illinois petitioned the United States Supreme Court for writ of certiorari on December 22, 1998, which was granted May 3, 1999. App. 34.

SUMMARY OF ARGUMENT

Petitioner's attempt to seek a *per se* rule that flight from police always constitutes reasonable suspicion to justify a *Terry* stop is factually and legally unsupportable and violates core Fourth Amendment principles. A *Terry* stop—briefly and narrowly circumscribed—involves a different kind of intrusion upon individual freedom than a traditional arrest. *See Terry v. Ohio*, 392 U.S. 1 (1968). Under *Terry*, the Court ruled that, in limited circumstances, the government's interest in preventing imminent criminal activity could outweigh the historic and significant privacy interests implicated in such a stop. *See id.* at 27. Therefore, in limited circumstances when the intrusion on the individual was minimal and the law enforcement interests outweighed the privacy interests, a *Terry* stop was consistent with the Fourth Amendment.

Factually, an individual standing in front of a building, violating no city, state or federal laws, who flees at the sight of numerous police cars and officers caravanning through a neighborhood, does not justify a temporary, investigative stop. At best, such flight may be one of several factors to consider in determining whether reasonable suspicion has been sufficiently articulated to authorize police to stop an individual. Contrary to Petitioner's request for a bright-line rule regarding reasonable suspicion, this Court has long held that reasonable suspicion determinations cannot be reduced to a "neat set of legal rules." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Reasonable suspicion must encompass a totality of circumstances. *See id.* at 417-18. To overrule this standard in place of a bright-line rule and disregard contextual circumstances diminishes judicial review, contradicts established totality of the circumstances precedent, and cries out for "a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

Moreover, the fact that a person in an undefined area flees from police is an insufficiently articulated basis for a *Terry* stop. To the extent Petitioner espouses a high-crime area exception to the Fourth Amendment (location plus evasion), the high crime area must be sufficiently localized and identifiable so that it can be meaningfully reviewed. The Illinois Supreme Court's decision in this case supports the courts' historic role of judicial review to act as a detached and neutral magistrate, scrutinizing the reasonableness of a law enforcement officer's justification for an investigatory stop.

The Illinois Supreme Court correctly concluded that the balance between the public's interest in crime detection and individuals' right to personal security and privacy tilts in favor of freedom from police interference. App. 26. That conclusion finds historical support in both common law and case law. *See Boyd v. United States*, 116 U.S. 616, 630 (1886) (discussing Lord Camden's opinion in *Entick v. Carrington*, 95 Eng. Rep. 807 (1765)).

As Petitioner concedes, an investigatory stop and frisk, as described in *Terry*, did not exist at the time the Framers wrote the Fourth Amendment. For this very reason, historical writings, Biblical quotes and common law cannot and do not legally, factually or historically support the notion of flight as culpable conduct.

The Framers would not have considered flight prior to accusation of a crime sufficient for a *Terry* stop because their bedrock concern was privacy and detached judicial review.[2] The Framers did not enact the Fourth Amendment to enhance the police investigative powers; rather, the Fourth Amendment is historically a regulation of warrantless and/or unrestricted searches. Courts must not relinquish their authority to review the decisions of law enforcement officers after a *Terry* stop. If this Court adopts Petitioner's bright-line rule, suppression motions based on flight from police will be reduced to the words: "He fled." A *per se* rule that flight

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[2] *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate School (Ann Arbor, MI) (available from UMI Dissertation Services, 300 N Road, Ann Arbor, MI)) at 1547.

from police constitutes reasonable suspicion for a *Terry* stop would unreasonably broaden police discretion and significantly curtail the courts' authority to review police actions. Further, Fourth Amendment jurisprudence recognizes the affirmative right to avoid police contact, which should not be qualified by the manner in which it is exercised.

This Court should affirm the Illinois Supreme Court's decision and uphold the totality of circumstances test.

ARGUMENT

A. A PERSON'S FLIGHT FROM POLICE, ABSENT OBJECTIVE CRITERIA OF CRIMINAL BEHAVIOR, IS NOT SUFFICIENT TO JUSTIFY A TEMPORARY INVESTIGATIVE STOP PURSUANT TO *TERRY v. OHIO*.

Common law, case law, established precedent and particularly this record, do not support Petitioner's proposed *per se* rule that flight from police always constitutes reasonable suspicion to justify a *Terry* stop. Such a rule is factually and legally unsupportable and violates core Fourth Amendment principles.

1. The Fourth Amendment Safeguards the Privacy of Individuals Against Arbitrary Invasions by Government Officials.

The Fourth Amendment to the United States Constitution, as it applies to the states through the Fourteenth Amendment, protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." U.S. CONST. amend. IV; U.S. CONST. amend. XIV. The Fourth Amendment was drafted to secure the right of

privacy against arbitrary police entries by taking the decision to search from the police and placing it with a neutral magistrate. The language in *Camara v. Municipal Court* is typical: "The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 367 U.S. 523, 530-31 (1967). *See also Boyd v. United States*, 116 U.S. 616, 630 (1886).[3] As Justice Frankfurter noted in his dissent in *United States v. Rabinowitz*, 339 U.S. 56 (1950), which was cited with approval in *Chimel v. California*, 395 U.S. 752 (1960), the prohibition against unreasonable searches must be interpreted in light of this purpose:

> One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable.' Words must be read with the gloss of the experience of those who framed them. Be-

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[3] In discussing Lord Camden's opinion in *Entick v. Carrington*, 95 Eng. Rep. 807 (1765), which expressed the basic principles later embodied in the Fourth Amendment, the Court said:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . . [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .

Boyd, 116 U.S. at 630.

> cause the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed 'unreasonable' searches and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

Rabinowitz, 339 U.S. at 70 (Frankfurter, J., dissenting).

Petitioner's request for a *per se* rule that flight from police always constitutes reasonable suspicion for a *Terry* stop is a less than subtle request to diminish the power of the judiciary to "police the police." *See* Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 371 (1974). The scheme of the Fourth Amendment becomes meaningful only when those engaged in the competitive enterprise of ferreting out crime are subjected to the detached, neutral scrutiny of a judge who examines particularized observations, taking into account the totality of circumstances. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

2. *Terry v. Ohio* Requires Reasonable Suspicion Based Upon the Totality of Circumstances that Crime Is Afoot, Prior to a Temporary Investigative Stop.

Terry v. Ohio created a narrow exception to the probable cause requirement of the Fourth Amendment for

certain seizures of a person that do not rise to the level of full-fledged arrests. 392 U.S. 1 (1968). This narrowly drawn exception to the Fourth Amendment places a limit on reasonable suspicion and is grounded in the fundamental, constitutional limits on government intrusion into the privacy and autonomy of citizens.

In *Terry*, Officer McFadden observed two men standing on a street corner in downtown Cleveland. *See Terry*, 392 U.S. at 5. Officer McFadden watched one of the men walk up and down the street, look in a store window, turn around, look in the store window again and then rejoin his companion on the corner. *See id.* at 6. The second man repeated this routine. *See id.* The two men undertook this routine five or six times. *See id.* When a third man joined the group, Officer McFadden suspected the men were "casing a job, a stick up." *Id.* He approached the men, identified himself, and requested identification. *See id.* When the men "mumbled something," Officer McFadden spun one of the men around, patted him down, felt and removed a pistol. *See id.* at 7. A frisk of the second man also revealed a pistol. *See id.*

In *Terry*, the Court held that limited circumstances existed in which the government's interest in preventing imminent criminal activity could outweigh the historic and significant privacy interests implicated in such a stop. *See id.* at 27. A *Terry* stop requires reasonable particularized suspicion—short of probable cause—that criminal activity is afoot. *See id.* at 16. Reasonable suspicion requires some probability that the suspect is engaged or is about to be engaged in criminal activity, supported by particularized observations of the indi-

vidual that distinguishes that individual from the larger universe of law-abiding citizens. *See, e.g., Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (stating that facts which describe a very large category of presumably innocent travelers cannot justify a finding of reasonable suspicion).

This Court has affirmatively resisted clearly defining the boundaries of reasonable suspicion, terming it a "common sense, nontechnical standard." *Ornelas v. United States*, 517 U.S. 690, 695 (1996).[4] *See also United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Cortez*, 449 U.S. 411, 417 (1981). While reasonable suspicion has not been quantified, this Court has previously held that it is something less than probable cause,[5] which has been described as a "fair

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[4] *See also Alabama v. White*, 496 U.S. 325, 330 (1990) (rejecting a *per se* rule for determining whether an anonymous tip could be a sufficient basis for a *Terry* stop; stating that reasonable suspicion "is dependent upon both the content of information possessed by police and its degree of reliability."); *Adams v. Williams*, 407 U.S. 143, 147 (1972) (rejecting respondent's argument that reasonable suspicion can only be based on the officer's personal observation; "one simple rule will not cover every situation.").

[5] In *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987), *rev'd*, 491 U.S. 1 (1989), the Ninth Circuit rejected an investigatory stop because federal drug agents did not have reasonable suspicion to justify the detention. The Appellate Court ruled that reliance upon a "drug courier profile" would not support a finding of reasonable suspicion unless agents provided "empirical documentation" that "innocent behavior is not so innocen.." *Id.* at 1420. The Supreme Court reversed, stating that empirical proof was unnecessary to satisfy the Fourth Amendment standards and ruled that when deciding whether there is reasonable suspicion for detention "one must

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probability." *See Illinois v. Gates*, 462 U.S. 213, 238 (1983). Reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence," *Sokolow*, 490 U.S. at 7, and requires more than a mere "inchoate and unparticularized suspicion or hunch." *Terry*, 392 U.S. at 27. Even in high crime areas, where the possibility exists that any given individual is armed, *Terry* requires reasonable individualized suspicion before a frisk for weapons can be conducted. *See Maryland v. BUIE*, 494 U.S. 325, 334 (1990). *See also Ybarra v. Illinois*, 444 U.S. 85 (1979). As this Court stated:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Cortez, 449 U.S. at 417-18. In other words, some particularized observations that implicate an identified individual must be offered to support the claim of reasonable suspicion.

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[5] (...continued)
consider the totality of the circumstances—the whole picture." *Sokolow*, 490 U.S. at 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

3. A *Terry* Stop of a Person Who Is Not Violating Any Laws and Flees at the Sight of Four Police Cars and Eight Police Officers Would Have Been Regarded as an Unlawful Seizure at Common Law.

Petitioner correctly concedes that *Terry* stops did not exist at the time of the Constitution's framing or adoption. Petitioner's brief at 5, 14. Nonetheless, Petitioner undertakes a historical-literal analysis and concludes that at common law, flight would have been deemed reasonably suspicious behavior justifying such a stop. Petitioner's brief at 15. Petitioner's brief historical Fourth Amendment analysis of selected writings and opinions regarding flight after a charge has been brought against an individual may be enticing, but it is factually infirm, legally unsound and ultimately unfounded.[6]

Petitioner ignores several exhaustive historical analyses of the Fourth Amendment,[7] instead focusing on isolated quotes taken out of context regarding flight and a mistaken analysis of certain cases. Petitioner suggests that a quote from *Proverbs*[8] "developed into a legal presumption of guilt that was firmly embedded in the common law at the time the Framers adopted the Fourth Amendment." Petitioner's brief at 15. From that Biblical quote to early common law, Petitioner finds a common thread that the guilty flee justice; this thread, however, is unduly frayed and cannot support its argument.

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[6] Petitioner's analysis has been described elsewhere as "lawyers histories."

> [I]t is important that we recognize lawyers' histories for what they are, and for what they are not. This kind of work is not constitutional history, it is not legal history; it is not history. It is a lawyer's selective use of historical data to advance a legal argument. It is part of a time-honored tradition in which most legal scholars who write about constitutional history participate from time to time.

Morgan Cloud, Searching Through History; Searching for History, 63 U. CHI. L. REV. 1707, 1745 (1996).

[7] The most comprehensive history of the amendment ever written sheds some light on the present debate. William J. Cuddihy's 1800-page unpublished Ph.D. dissertation, The Fourth Amendment: Origins and Original Meaning, has been (continued...)

[7] (...continued)

described as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting). Cuddihy's work is "essential reading for students of the Fourth Amendment" and presents "an overwhelming documentary record." Cloud, *supra*, at 1712-13. *See also* Tracey Maclin, When the Cure for the Fourth Amendment is Worse Than the Disease, 68 S. CAL. L. REV. 9-12 (1999). Nonetheless, even Cuddihy acknowledges that the history of the Fourth Amendment is simply too complex and too vast to be reduced to simplistic legal theories. While Cuddihy's work is exhaustive and detailed, he too recognizes:

> [T]he history that preceded the Fourth Amendment, however, reveals a depth and complexity that transcend language. To think of the amendment as a right against general warrants disparages its intricacy. The amendment expressed not a single idea but a family of ideas whose identity and dimensions developed in historical context . . . Those who advocate adherence to the amendment's original understanding should consider that its authors expressed conflicting understandings of probable cause and of an enforcement mechanism.

Cuddihy, *supra*, at 1555-56.

[8] "The wicked flee where no man pursueth." *Proverbs* 28:1.

Petitioner's reliance on Nineteenth Century literature to support its argument that flight imports guilt, which highlights isolated quotations from A.M. Burrill's Circumstantial Evidence (1868) and William Blackstone's Commentary on the Law of England (1765-1769), is misplaced. Those commentaries shed little light on the Framers' intent as they regard an issue not yet contemplated at that time. Indeed, those references relate to inferences of flight after an accusation of criminal activity, which is hardly equivalent to inferences of flight prior to accusation.

Likewise, Petitioner's historic references to "flight" within the context of Nineteenth Century case law are equally flawed. Again, the cases cited by Petitioner involve individuals who fled subsequent to being charged with a crime.[9] *See Hickory v. United States*, 160 U.S. 408, 422 (1896) (reversing a murder conviction because the instructions given to the jury concerning flight after a charge had been brought were "tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth"); *Starr v. United States*, 164 U.S. 627, 631-32 (1897) (reversing a murder conviction because the instructions given to the jury were identical to those in *Hickory* and *Alberty v. United States*, 162 U.S. 499

[9] *See, e.g.*, 2 John H. Wigmore, Evidence § 276, at 122 (James H. Chadbourn ed. 1979) ("It is universally conceded today that the fact of an accused flight . . . is admissible as evidence of consciousness of guilt, and thus of guilt itself."). The inferences to be drawn from the flight after accusation bear no relationship to the inferences to be drawn from the flight of an individual prior to accusation. *See id.*

(1896)); *Allen v. United States*, 164 U.S. 492, 499 (1896) (reaffirming *Hickory* and *Alberty*, stating that "flight of the accused is competent evidence against him as having a tendency to establish his guilt."). Indeed in these cases, an individual fled from the police specifically because he was charged with a crime. Flight did not precede the charge of criminal activity. Equally interesting was the Court's prescient acknowledgment that sometimes innocent men flee through fear of being misapprehended as the guilty party or through fear of humiliation.[10] *See Alberty*, 162 U.S. at 511. Nevertheless, in each case, the Court held that it was error to charge the jury that flight created a legal presumption of guilt.

Petitioner's support for its assertion that "when the Fourth Amendment was framed, the common law would have regarded . . . flight from police as . . . evincing conclusive proof of guilt . . . that would have constituted probable cause justifying a full blown arrest," is misplaced. Petitioner's brief at 21. Again, flight after a charge hardly carries the equivalent inferences of flight prior to a charge. This argument, simply stated, fails in its entirety.

To achieve the right to be secure from arbitrary intrusions, the Framers of the Fourth Amendment interposed the search warrant requirement between the public and the police, reflecting the conviction that,

[10] More recently, it has been argued that people also flee out of fear of misidentification, harassment, beatings or having evidence planted on them. *See* David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659, 680 (1994).

except in special circumstances, the decision to enter and search a particular place should not rest with the officer in the field, but with a neutral magistrate whose approval could issue only for a particular place and after a showing of probable cause.[11]

Petitioner concludes that "it takes no great leap in logic or reliance on speculation" to find that the Framers would have agreed that, standing alone, unprovoked flight from police would have permitted a temporary investigatory stop. Petitioner's brief at 21. Respondent has demonstrated that Petitioner's conclusion is ill-founded. Petitioner's abbreviated survey of Biblical quotations and common law do not support its conclusion that flight from authorities, prior to accusation, would have been presumptive of guilt. In fact, in light of Fourth Amendment jurisprudence, the Framers were less concerned with the identification of unreasonable searches and seizures "than with the broader rights, including privacy." Cuddihy, *supra*, at 1545. Moreover, the Framers reflected a constitutional preference for judicial, not police, determination of the factors that justify a temporary stop. Petitioner's argument is unsupported, contrary to the common law and, in view of

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[11] *See McDonald v. United States*, 335 U.S. 451, 455-56 (1948):

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

Id.

the historic preference for judicial review, wrong.[12] Finally, Petitioner ignores the fact that the provisions for the protection of life, liberty and property are largely, liberally and historically construed in favor of the individual.[13]

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[12] Thus, Petitioner's bold claim that opponents of a bright-line rule "cannot escape the one and only relevant conclusion to the present analysis when the Fourth Amendment was framed, the common law viewed flight as conclusive proof of guilt and boldly adopted a *per se* forfeiture law in order to deter flight from authorities," has been conclusively rebutted. Petitioner's brief at 20. Flight after-the-fact does not carry the same legal presumption as flight before-the-fact.

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> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

Boyd v. United States, 116 U.S. 616, 635 (1886). Thus, Petitioner's argument that *Terry* stops are justified because they are minimal, brief intrusions typically occurring in a public place which foster good police work is nonetheless an illegitimate and unconstitutional practice, even in its modest and least repulsive form. Petitioner's brief at 6.

B. THIS COURT SHOULD UPHOLD THE TOTALITY OF CIRCUMSTANCES TEST TO DETERMINE REASONABLE SUSPICION FOR A *TERRY* STOP.

For nearly twenty years, courts have applied a totality of the circumstances test to determine whether reasonable suspicion existed to justify a *Terry* stop. In *United States v. Cortez*, the Court stated that in order to perform a brief, investigatory stop, "the totality of the circumstances—the whole picture—must be taken into account." 449 U.S. 411, 418 (1981). This consists of two elements, both of which must be present. First, an assessment based on all circumstances must be made, which includes objective observations as well as subjective analysis of the information and observations gathered. Second, the assessment of the whole picture must raise a suspicion that the individual being stopped is engaged in criminal conduct. *See id.* The decision to conduct a stop, in light of the totality of the circumstances, is then subject to the detached review by a judicial officer. This test has rightfully been upheld for almost twenty years because it embodies core constitutional values and mandates discretion before infringing upon personal rights. Petitioner, however, seeks to eviscerate this test and abandon judicial review in favor of a bright-line rule that will enable police to perform *Terry* stops whenever someone simply flees from them.

1. Police Must Consider Contextual Circumstances in Determining Reasonable Suspicion.

Petitioner also argues that the government's interest in fostering good police work and preventing and detecting crime overwhelmingly outweighs the limited in-

trusion of a temporary investigative stop of an individual who flees at the sight of police. Petitioner's brief at 6, 22. However, this argument fails to answer the question "when, if ever, that interest outweighs the interest in personal liberty." *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 914 (1992) (Stevens, J., concurring in part and dissenting in part) (referring to the conflict surrounding Pennsylvania state abortion law and the Constitution). Petitioner apparently suggests that flight from police, regardless of context, always justifies a *Terry* stop, outweighing an individual's personal liberties.[14] The frailty of Petitioner's argument lies in the fact that context (i.e., time, place, location, number of persons present, weather, furtive gestures) provides the necessary articulation to determine when the government's interest outweighs the individual's privacy. Petitioner's failure to articulate the context of Respondent's flight prevents meaningful

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[14] Petitioner also argues that if flight alone does not constitute reasonable suspicion, then police officers must stand idly by while crime occurs and a potential criminal escapes. Petitioner's brief at 36; United States brief at 17. Of course, an officer who observes a crime can make an immediate arrest. *See United States v. Watson*, 423 U.S. 411 (1976). Further, in *California v. Hodari D.*, 499 U.S. 621 (1991) and *Michigan v. Chesternut*, 486 U.S. 567 (1998), this Court ruled that police pursuits do not trigger Fourth Amendment safeguards in all circumstances. In *Chesternut*, this Court held that a police vehicle's brief pursuit of a man who ran from police was not a seizure under the Fourth Amendment and therefore did not require reasonable suspicion. 486 U.S. at 576. In *Hodari D.*, this Court held that a police show of authority directed to a person fleeing did not effectuate a seizure. 499 U.S. at 626. While police do not need reasonable suspicion to pursue, observe, or further investigate the facts surrounding the flight, they need articulable reasonable suspicion to perform a stop.

judicial review. Simply stated, no such testimony exists in this record.[15] Reasonable suspicion determinations must be made based on articulable facts which, together with rational inferences, provide a particularized and objective basis for suspecting an individual of criminal activity. *See Terry*, 392 U.S. at 16. In the present case, the Illinois Supreme Court correctly applied the totality of circumstances test, examined the record, found it lacking, and determined on the facts available that Respondent's flight, standing alone, was insufficient to create a reasonable suspicion of involvement in criminal conduct.

Petitioner discusses, at some length, a day in the life of a law enforcement officer. Petitioner's brief at 8. On routine patrol, a police officer will encounter numerous citizens engaged in their daily activities whose reactions to police will vary from reassurance to fear, from a greeting to a glance and, for some, avoidance. That some citizens will ignore, avoid, walk away, or flee from police is hardly uncommon in certain areas at certain times. Avoidant behavior, then, be it walking away, running, jogging or fleeing at top speed is ambiguous. However, Petitioner ignores the fact that through its

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[15] *See, e.g., State v. Valentine*, 636 A.2d 505, 514 (N.J. 1994) (Clifford, J., dissenting) ("This case strikes me as not much more than a challenge to our ingenuity in teasing out of this slim record a range of nuances of conduct and speech that lead to a result favoring either admissibility or suppression.").

Again, the record fails to inform any court as to the following relevant information: Did all four police cars stop at the same time? How many police officers got out of their cars? What is Wardlow's age (18 to 65)? Height? Weight? Was Wardlow wearing gym shoes or worker's boots?

own discretionary authority, police officers often initiate encounters—proactive police work—as opposed to reactive, citizen-initiated police work. Reactive police encounters result from citizen complaints, which direct police to specific locations, suspects or potentially criminal acts. In proactive, police-initiated encounters, the police have the discretion to select locations and individuals for attention. In reactive situations, police officers have received information that may form the foundation of articulable, reasonable suspicions upon their arrival at certain locations. In proactive situations, however, police must observe, and not create, articulable suspicion.[16] Here, four police cars were "caravanning" through the area. "They were not responding to any call or report of suspicious activity in the area" which may have provided a contextual basis for reasonable suspicion. App. 24. In other words, they were engaged in proactive policing. Respondent was simply standing in front of a building, not violating any laws, when the officers drove by. Respondent gave no

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[16] The concepts "reactive" and "proactive" derive from the origins of individual action, the former referring to actions originating in the environment, the latter to those originating within the actor. *See* Murray, Toward a Classification of Interactions, Toward a General Theory of Action, 434 (1987). Professor LaFave describes "stop and frisk" as "a time-honored police procedure [where] officers . . . stop suspicious persons for questioning and, occasionally . . . search these persons for dangerous weapons." Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters*, and Beyond, 67 MICH. L. REV. 39, 42 (1968). According to LaFave, stop and frisk "is a distinct law enforcement technique which has characteristics quite different from other police practices such as arrest or search incident to arrest, and has long been viewed by the police in this way." *Id.*

indication that he was involved in any illicit activity prior to the approach of police. In this case, the police, by their own observations and testimony, could not articulate a reasonable suspicion to justify stopping Respondent.

2. The Illinois Courts Never Characterized Respondent's Flight as "Unprovoked."

Petitioner repeatedly argues that a person's sudden and unprovoked flight from police officers in a high crime area is innately suspicious, justifying a temporary *Terry* stop. Neither the Illinois Supreme Court nor Appellate Court ever referred to Wardlow's flight as "unprovoked."[17] Indeed, while the record does not disclose sirens blaring or commands to stop, neither does it support "mere flight" or "lack of provocation." Respondent was not talking or standing with others, made no furtive gestures, nor was he near an identifiable drug location. *See, e.g., Minnesota v. Dickerson*, 113 U.S. 2130 (1993). Petitioner's representation of the facts—Respondent was "running away from a clearly identifiable police officer"—simply does not conform to

[17] Petitioner plucked the word "unprovoked" from *Michigan v. Chesternut*, wherein Justice Kennedy stated: "It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for [Chesternut's] unprovoked flight gave the police ample cause to stop him." 486 U.S. 567, 576 (1991) (Kennedy, J., concurring). Indeed, the talismanic invocation of "unprovoked" is a bit like Humpty Dumpty's use of the word "impenetrability" with Alice. When she asks him what it means and what he means when he uses it, Humpty responded, "When I make a word do a lot of work like that, I always pay it extra." Lewis Carroll, Through the Looking Glass and What Alice Found There 125 (1993).

the record. Petitioner's brief at 9. Arguably, Respondent fled at the sight of four police cars and eight police officers, who converged on that location simultaneously. This behavior is not innately suspicious and is not the "unprovoked flight from a police officer" that Petitioner suggests. Petitioner's brief at 8. The record was too vague to make this finding.[18] More importantly, the officers knew that absent their approach, there was no basis for a *Terry* stop; a person standing alone in front of a building, in and of itself, is not suspicious.[19]

[18] In a similar vein, Justice O'Connor, in her dissent in *Vernonia Sch. District 47J v. Acton* where the majority upheld random drug testing of students, stated "[p]erhaps there is a drug problem at the grade school, but no one would know it from this record." 515 U.S. 646, 684 (1995) (O'Connor, J., dissenting). O'Connor also noted that judges should "stay close to the record in each case that appears before them, and make their judgments based on that alone." *Id.* at 686 (O'Connor, J., dissenting).

[19] *See, e.g., United States v. Embry*, 546 F.2d 552 (3d Cir. 1976):

> Here, prior to the flight, the officers knew that [defendant] had merely been leaning against the building. Viewed objectively, what prompted his flight was not the desire to escape from the scene of a crime, but the desire to avoid being subjected to a forcible stop and frisk. Because he did not wait to be forcibly searched . . . but ran instead, we are told that it is reasonable to believe that [defendant] was engaging in criminal activity. The hidden assumption is that only a criminal would object to being frisked. By parity of reasoning, every refusal to consent to a search is sufficient cause to conduct the search without consent.

Id. at 559 (Seitz, J., dissenting).

Respondent's flight from a caravan of police cars,[20] when viewed in "the whole picture," did not provide objective criteria pointing to a reasonable suspicion of criminal activity.

C. FLIGHT MAY BE ONE FACTOR IN DETERMINING REASONABLE SUSPICION OF CRIMINAL ACTIVITY, BUT FLIGHT ALONE CANNOT SUPPORT A *TERRY* STOP.

Numerous federal and state courts have held that flight alone at the sight of police is insufficient to justify a temporary investigatory stop. *See, e.g., United States v. Quinn*, 83 F.3d 917, 921-22 (7th Cir. 1996) (flight is not necessarily enough standing alone for a *Terry* stop, but it is a relevant and probative factor in establishing reasonable suspicion); *United States v. Bennett*, 514 A.2d 414, 416-17 (D.C. Cir. 1986) (although flight alone is insufficient, it may be considered among other factors in order to justify a *Terry* stop); *United States v. Embry*, 546 F.2d 552, 555-56 (3d Cir.

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[20] On this point, Respondent agrees with Amicus Curiae of the Criminal Justice Legal Foundation that "if an officer tries to scare someone into fleeing the flight is no longer suspicious and the attempt to provoke the flight is unconstitutional." Charles L. Hobson, Flight and *Terry*: Providing the Necessary Bright Line, 3 MD. J. CONTEMP. LEG. ISSUES 119, 150 (1992). *See* Brief Amicus Curiae of the Criminal Justice Legal Foundation at 17. Indeed, in this case, Wardlow's flight at the sight of four police vehicles and eight police officers may arguably and inferentially be indicia of provocation. Respondent's flight may also have been based upon fear of harassment, gunfire in the neighborhood, an imminent arrest or such other reasonable belief that precipitated the arrival of so many police cars and officers.

1976) (flight is but one factor to consider in determining reasonable suspicion); *Britt v. State*, 673 So. 2d 934 (Fla. 1996) (flight from police alone is not enough to support a *Terry* stop); *People v. Holmes*, 619 N.E.2d 396 (N.Y. 1993) (flight is not sufficient, standing alone, to justify police pursuit); *State v. Hicks*, 488 N.W.2d 359 (Neb. 1992) (flight is not sufficient, standing alone, to justify a *Terry* stop); *People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985) (flight alone is not sufficient for a *Terry* stop). Were it otherwise, "anyone who does not desire to talk to the police and who either walks or runs away from them would always be subject to legal arrest," which can hardly "be countenanced under the Fourth and Fourteenth Amendments." *United States v. Margeson*, 259 F.Supp. 256, 265 (E.D. Pa. 1966).

Petitioner's proposed bright-line rule regarding flight from law enforcement officers ignores the totality of the circumstances test, eviscerates the particularized basis for individualized suspicion and seeks to replace it with a *per se* evasion test. The result: observations of minimal significance (standing in front of a building and fleeing upon the appearance of four police cars) would be instantly elevated to reasonable suspicion without any particularized basis for that suspicion. Worse yet, upon the testimonial incantation of "He fled", judicial review of suppression motions would be eliminated, undermining the court's historic role as a detached, neutral magistrate.

The argument that flight alone cannot support reasonable suspicion is logically founded on the idea that, at the stage when an officer could not compel cooperation, an individual's flight simply anticipates refusal to cooperate with the officer's potential decision

to stop. *See, e.g., People v. Holmes*, 619 N.E.2d 396, 398 (N.Y. 1983) ("flight alone or even in conjunction with equivocal circumstances that might justify a police request for information is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry") (citations omitted).

In *Florida v. Royer*, two Drug Enforcement Agency (DEA) agents approached the defendant in an airport and asked to see his driver's license and airplane ticket. 460 U.S. 491, 493-94 (1983). When the names on the two documents did not correspond, the agents identified themselves and told Royer they suspected him of transporting narcotics. *See id.* at 494. The agents withheld Royer's license and ticket and requested that he accompany them for further questioning. *See id.* Subsequently, Royer consented to a search of his luggage. *See id.*

The issue before this Court was whether the consent was the fruit of an unlawful seizure. *See id.* at 493. Justice White, writing for the majority, found that Royer had been seized. *See id.* at 501. Justice White stated that the request for Royer's license and ticket was permissible, however, when Royer was asked to accompany the agents to a police room without indicating that he was free to refuse, the agents effectively seized him. *See id.* at 492. This Court stated that a person approached by the police has the fundamental right to withhold cooperation and "go on his way." As Justice White explained, "The person approached . . . need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily

without reasonable objective grounds for doing so." *Id.* at 497-98 (citations omitted).[21]

Also, in *Florida v. Bostick*, this Court reaffirmed that citizens are not required to tolerate police inquiries and may refuse to cooperate with legitimate law enforcement practices. 501 U.S. 429 (1991). Although police questioning was permitted without reasonable suspicion, the Court carefully pointed out that it had "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.* at 437. The Court has not made it a prerequisite that a citizen first allow an officer to approach him before exercising his right to ignore the officer. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (stating that a citizen has a right to ignore his interrogator and walk away).

Furthermore, in *Brown v. Texas*, Brown and another individual were observed walking in opposite directions from each other in an area known for high narcotics traffic. 443 U.S. 47, 52 (1979). Police officers detained Brown after he refused to reveal his identity. *See id.* at 49. The officers stopped Brown because "the situation looked suspicious and they had never seen Brown in that area before." *Id.* A unanimous court invalidated the statute, holding that because the officers lacked reasonable suspicion that Brown was involved in crim-

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[21] *See also INS v. Delgado*, 466 U.S. 210, 216-17 (1984). The Court stated that "if the person refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *Id.*

inal conduct, his detention to ascertain his identity violated the Fourth Amendment. *See id.* at 51-52. Further, the choice to refuse police contact could not be used as a bootstrap to justify an investigative stop.

Thus, while *Terry* and its progeny permit temporary investigatory detentions of persons where reasonable suspicion of criminal behavior exists, it is clear that the core right of all persons to avoid police in the absence of objective evidence of criminality has never been questioned. Indeed, if a person approached may decline to listen and go on his way, he may certainly go on his way quickly. To permit law enforcement officers the unbridled discretion to decide if the individual walked away too quickly, ran or fled, or got on a bike or in a cab at the sight of police, would grant them unfettered discretion to arbitrarily decide the difference between avoidance and flight.[22] Inherent in such an analysis is that law enforcement officers may often consider suspicious conduct that is otherwise constitutionally protected.[23]

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[22] The Solicitor General approaches this dilemma from a different perspective. Rather than arguing that running in the opposite direction from identifiable law enforcement officers is suspicious, he instead argues, "To the contrary, respondent dramatically altered his behavior in direct response to the officers' arrival." Brief for the United States at 19. The Solicitor General argues that the right to "go on his way" depends on how it is exercised. Under the Solicitor General's theory, the affirmative right to locomotion is limited by an officer's interpretation of how it is exercised.

[23] In this case, Officer Nolan testified that the reason for having four police cars converge on the location was because "[n]ormally in these different areas, there's an enormous

(continued...)

The *Terry* court stressed that the Fourth Amendment's protection was not limited to the concept of freedom from arbitrary restraint. The Amendment also protected the right to avoid police contact. "The person addressed (by a police officer) has an equal right to ignore his interrogator and walk away." *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring). This Court has recognized that an individual's decision to refuse police contact cannot be used against the individual to justify an investigative stop. *See Brown v. Texas*, 443 U.S. 47,

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[23] (...continued)
amount of people, sometimes lookouts, customers." App. 8. Actually, it was lunch time in a Chicago neighborhood. *See, e.g., Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) ("The agent's belief that [Reid] and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and unparticularized suspicion or hunch,' than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.") (quoting *Terry*, 392 U.S. at 27); *Brown v. Texas*, 443 U.S. 47, 49 (1979) (officer's testimony that suspect looked suspicious and had never been seen before does not constitute reasonable suspicion); *Sibron v. New York*, 392 U.S. 40, 62 (1968) (officer testified that he approached and searched Sibron because he saw Sibron in the company of known narcotic addicts; "the inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."). *See also State v. Ellington*, where the majority held there was no reasonable suspicion to stop a person in an area "known for high drug activity" who, upon seeing the officer, put his hands in his pocket as if attempting to conceal something. 680 So. 2d 174, 175 (La. Ct. App. 1996); *Tumblin v. State*, 664 N.E.2d 783, 785 (Ind. Ct. App. 1996) ("The color of one's skin, the neighborhood one happens to be in, and the fact that one turns away from the police are not sufficient, individually or collectively, to establish a reasonable suspicion of criminal activity.").

53 (1979). Since the right to avoid police contact is an affirmative right, its existence should not be subject to the manner or speed with which it is exercised.

Here, Wardlow was standing alone in front of a building at 4035 West Van Buren. App. 7. At the time Officer Nolan first observed Wardlow, he was not violating any laws; indeed, he was not speaking or engaged with anyone. The police officers were "not responding to any call or report of suspicious activity in the area" and he "gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan's vehicle. Defendant was simply standing alone in front of a building when the officers drove by." App. 24, 25. Officer Nolan offered no testimony of any suspicious activity by Wardlow prior to his flight from the multiple police cars and officers.

Respondent does not argue that flight from police under certain circumstances may never be relevant to a determination of reasonable suspicion. Rather, Respondent submits that absent corroborating circumstances that an individual was involved in criminal activity prior to flight, an officer's observation of flight "reveals nothing more than a hunch." App. 26. The officers' observation of Respondent's running away undoubtedly created a suspicious hunch, its articulation being, "He ran from me, he must have done something." The Illinois Supreme Court wisely determined that absent specific facts corroborating the inference of guilt gleaned from Respondent's flight, his stop and subsequent arrest were constitutionally infirm. App. 27.

The Illinois Supreme Court's narrow holding recognized that *Terry* was "based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable in the street as it is in the home." App. 21 (quoting *State v. Hicks,* 488 N.W.2d 359, 363 (Neb. 1992)). The Illinois Supreme Court left for another day the myriad instances of flight plus other factors that would constitute reasonable suspicion for a *Terry* stop. This Court should preserve the totality of the circumstances test as the best means to ensure judicial review of law officers' reasonable suspicion determinations.

D. TO PASS CONSTITUTIONAL MUSTER, A "HIGH CRIME AREA" SHOULD BE SUFFICIENTLY LOCALIZED TO ASSURE THAT AN INDIVIDUAL'S REASONABLE EXPECTATION OF PRIVACY IS NOT SUBJECT TO THE UNFETTERED DISCRETION OF POLICE.

Petitioner's high crime area exception to the Fourth Amendment (location plus evasion) suggests that if a person finds himself in a high crime area, he may be searched without particularized facts or individualized suspicion. This theory is flawed in that it eliminates the requirement of individualized suspicion, which is fundamental to Fourth Amendment jurisprudence.

The Illinois Appellate Court, performing a *de novo* review, found, "The record here is simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking or, for that matter, that defendant's flight was related to his expectation of police focus on him." App. 32. The appellate court emphasized the limited nature of its holding, stating that it did not hold that "the presence of a suspect in a high crime location together with his subsequent flight from police is never grounds for a *Terry* stop." App. 33. Rather, that court emphasized that "[t]o

pass constitutional muster, however, the high crime area should be a sufficiently localized and identifiable location . . . to 'assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.'" *Id.* (quoting *Brown v. Texas,* 443 U.S. 47, 51 (1979)).[24]

Petitioner argues that in the instant case, the "'high crime area' is not arbitrary or ephemeral because it can be quantitatively verified." Petitioner's brief at 7, 38. The record does not support this sweeping statement. The police presented no evidence of quantitative verification that identified the precise location or boundaries of the area known by the officers to have a high incidence of narcotics trafficking. App. 32. Indeed, Officer Nolan's testimony indicated only that the officers were headed somewhere in the general area. *See id.* The officers were not investigating a specific area, and they had no reason to believe a crime had been

[24] The Illinois Supreme Court, disagreeing with the appellate court in its *de novo* review, determined that there was sufficient evidence "to establish that the incident occurred in a high-crime area." App. 20. As this Court held in *Ornelas v. United States,* reasonable suspicion determinations should be subject to *de novo* review. 517 U.S. 690 (1996). In so ruling, the Court took care to distinguish the underlying facts, noting that "[t]he background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference." *Id.* at 699. To perform a *de novo* review, courts should require particularized observations to make their determinations. Both the appellate and supreme courts herein were hampered in this task by the inadequacy of the record on which they were asked to make their determinations. Nonetheless, in requiring particularized observations, the character of the neighborhood alone cannot constitute reasonable suspicion. *See Brown v. Texas*, 443 U.S. 47 (1979).

committed. *See id.* The Illinois Appellate Court found the record "too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking." *Id.* The Illinois Supreme Court echoed the appellate court's findings and further agreed with other jurisdictions that "a person's presence in such a [high crime] area by itself does not warrant a suspicion that that person is involved in crime."[25] App. 25. The "high crime area" factor is not an activity of an individual and cannot be determinative of reasonable suspicion.

The present case differs significantly from *Minnesota v. Dickerson*, which involved conduct at a specific location. 508 U.S. 366 (1993). In *Dickerson,* the question before this Court was whether a lower court may admit into evidence contraband found by an officer using only his sense of touch during an otherwise proper stop and

[25] The Illinois Supreme Court undoubtedly appraised this factor with caution and, like other courts, was reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances justifying the seizure of an individual. *See, e.g., People v. Bower,* 597 P.2d 115, 117 (Cal. 1979) (holding there was no reasonable suspicion to stop "a white man . . . with a group of black men in a black residential area" where the officer testified that he had never observed a white person in the projects and thus thought that either drugs or weapons were involved); *New v. State*, 674 So. 2d 1377 (Ala. Crim. App. 1995) (finding no reasonable suspicion where three white youths were driving at 3:30 a.m. at a low speed in a predominantly black neighborhood); *State v. Nealen*, 616 N.E.2d 944, 945 (Ohio Ct. App. 1992) (finding no reasonable suspicion where police observed a young white male in an "all black extremely high crime area" with his hand closed in a fist); *State v. Weitman*, 525 P.2d 293 (Ariz. Ct. App. 1974) (finding no reasonable suspicion to stop vehicle, which slowed down in front of a tavern; trial court excluded testimony that the tavern had a reputation for drug trafficking).

frisk. *See id.* at 368. Dickerson was observed leaving a multi-unit apartment building "known to be a notorious crackhouse." *Id.* at 368. One of the officers had previously participated in the execution of search warrants at that building. *See id.* Neither officer knew the defendant, where he had been in the building, or any reason to connect him to prior illegal activity in the building. *See id.* Upon seeing the police car and making eye contact with the officer, Dickerson stopped, turned and proceeded in a different direction. *See id.* at 369. Based on these facts—a location known for criminal activity and evasive action—the officers followed Dickerson into the alley, stopped and frisked him. *See id.* The police found cocaine in Dickerson's pocket. *See id.* This Court did not rule on the propriety of the stop and frisk; however, the Minnesota Supreme Court concluded the stop was justified. While "merely being in a high crime area will not justify a stop . . . defendant's evasive conduct, after eye contact with police, combined with his departure from a building with a history of drug activity, justified police in reasonably suspecting criminal activity." 481 N.W.2d 840, 843 (Minn. 1992) (emphasis added).

Unlike *Dickerson*, in which the activity took place in a single building and provided a particularized and localized location, Wardlow presented the Illinois Supreme Court with a vast, undefined, heavily populated area. Describing a neighborhood of nearly 100,000 people[26] as a high crime area is drastically different from identifying a single building because, regardless

[26] Appendix II of Amicus Curiae Brief of the National Association of Police Organizations, et al., reflects that the total population for the 11th District is 98,544 people.

of the neighborhood's high level of crime, large numbers of innocent persons still live and work there. *Dickerson* involves both identifiable conduct at a specific location, rather than mere presence in a neighborhood, and cannot be analogized to the present case.

Probable cause to search a person must be based on "a reasonable belief or suspicion directed at the person to be frisked." *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). In *Ybarra*, pursuant to a warrant, officers searched a tavern and its occupants for narcotics. *See id.* at 88. Ybarra was a patron of the tavern at the time of the search. *See id.* Ybarra was frisked as a safety measure and narcotics were found. *See id.* This court invalidated the search of Ybarra, explaining that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91. Justice Stewart rejected the argument that the frisk of Ybarra was proper under *Terry* due to his location on "compact premises subject to a search warrant." *Id.* at 94. Justice Stewart concluded that a person does not lose Fourth Amendment protection merely because he is found in the presence of others suspected of crime. *See id.* at 94-96. *See also Maryland v. BUIE*, 494 U.S. 325, 334-35 (1990).

Here, Officer Nolan's testimony reveals that he frisked Respondent because in his experience, it was common for weapons to be in narcotics areas. App. 11. Officer Nolan did not articulate any reasonable belief or suspicion that Wardlow was engaged in narcotics trafficking or that he reasonably believed or suspected Wardlow to be armed. In *Terry*, the Court permitted a pat down of the defendant for the officer's safety only

if an officer was able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the frisk. *See Terry*, 392 U.S. at 30. In this case, Officer Nolan testified generally that Respondent was stopped in an area of "high narcotics traffic" and that in his experience, weapons were in the vicinity. App. 7, 9-10. "Common knowledge" is insufficient to support a frisk. An officer must have individualized suspicion "directed at the person to be frisked" in order to justify a search. *Ybarra*, 444 U.S. at 94. No such basis existed in this case.

E. BY REQUIRING LAW ENFORCEMENT OFFICERS TO ARTICULATE THOSE OBSERVATIONS THAT CONSTITUTE REASONABLE SUSPICION, THE COURTS MAINTAIN JUDICIAL REVIEW, ELIMINATE ARBITRARY POLICE DISCRETION AND BALANCE THE PUBLIC'S RIGHT TO PERSONAL SECURITY AND PRIVACY IN FAVOR OF FREEDOM FROM POLICE INTERFERENCE.

Investigative stops are legitimate only when there is effective judicial oversight to justify those stops. *Terry* was premised on the requirement that police actions must be subjected to the "detached, neutral scrutiny" of a judicial officer. *See Terry*, 392 U.S. at 21 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."). Petitioner's proposed *per se* rule undermines the judiciary's meaningful role to scrutinize the reasonable-

ness of a particularized justification for a *Terry* stop,[27] leaving police discretion virtually unchecked.

In the past, this Court has rightfully prevented states from undermining judicial review. For example, in *Richards v. Wisconsin*, this Court rejected Wisconsin's attempt to adopt a blanket exception to the "knock and announce" requirement for the execution of search warrants and felony drug investigations, holding that such an approach "impermissibly insulates these cases from judicial review." 520 U.S. 385, 393 (1997). Instead, the Court required the State to show that the investigating officers had a reasonable suspicion that knocking would be dangerous, futile or would inhibit the investigation. *See id.* The Court concluded that the circumstances present in *Richards*—the suspect's recognition

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[27] *See, e.g.*, 4 Wayne R. LaFave, Search and Seizure § 9.4(f), 189-90 (3d ed. 1996).

> In view of the readiness with which courts make this characterization (as a high crime area), even as to better neighborhoods, it would seem that greater circumspection is called for here. Unspecific assertions that there is a crime problem in a particular area should be given little weight, at least to more particular indications that a certain type of criminal conduct of the kind suspected is prevalent in that area.

Id. See also Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 YALE L.J. 214, 222 n.42 (1983) ("The basis for declaring an area crime prone may be flimsy. Some police officers describe all areas as crime prone."). "Both the factors of class and neighborhood may be easily used as facades for race; this possibility should induce additional reluctance about attaching substantial weight to their presence." *Id.* at 256. *See also* Harris, *supra*, at 672-75 (arguing that "location" and "evasion" are used as proxies for race in reasonable suspicion determinations).

that there was a police officer at the door, plus the "easily disposable nature of the drugs"—sufficed to create the necessary reasonable suspicion. *Id.* at 396.

Further, rather than adopting a bright-line rule regarding flight in a high crime area that unduly infringes upon all citizens' rights to freedom of movement, the totality of circumstances test insures a system of checks and balances that best preserves personal privacy and assures effective law enforcement. The Illinois Supreme and Appellate Courts upheld the totality of circumstances test, knowing that a *per se* rule regarding flight in a high crime area would open the door further to arbitrary and discriminatory enforcement.[28]

The sparse facts of this case do not support the reversal of the totality of circumstances test. Moreover, it provides the very reason why such a test should be upheld. So long as law enforcement officers are performing their job properly, they do not need a bright-line rule. Citizens, however, must know that they may freely move—regardless of the neighborhoods in which they live and work—without fear of harassment and knee-jerk suspicions by police. The totality of the circumstances test best assures this result.

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[28] In *City of Chicago v. Morales*, the Illinois Supreme Court expressed concern that the loitering ordinance in question provided absolute discretion to police officers to determine what activities constitute loitering. 687 N.E.2d 53, 63 (1997). This Court affirmed, noting that the ordinance delegates too much discretion to the police. 119 S. Ct. 1849, 1861, ___ U.S. ___ (1999).

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully Submitted,

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